Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, et al.,
PETITIONERS,

-VS-

MICHAEL EMERSON CORRELL,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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125 pp

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Michael Correll's three first-degree murder convictions and two death sentences were affirmed by the Arizona Supreme Court. In his state post-conviction relief petition, Correll alleged that his attorney at sentencing was constitutionally deficient for not presenting additional mitigating evidence. Correll failed to allege any additional evidence not presented at the time of sentencing, and his post-conviction relief attorney conceded that he could not prove prejudice under *Strickland v. Washington*. Based on the record before him, the state trial judge denied the petition as failing to state a colorable claim.

Correll filed a petition for writ of habeas corpus raising, inter alia, a claim of ineffective assistance of counsel at sentencing. Correll moved to supplement his petition to include affidavits and other evidence never alleged or presented to the state courts in support of his ineffectiveness claim. The district court concluded that this new evidence could not be considered based on this Court's holding in *Keeney v. Tamayo-Reyes*, and denied Correll's request for an evidentiary hearing. The Ninth Circuit reversed, finding that there was no "evidence exhaustion" requirement under *Keeney* and that Correll was entitled to an evidentiary hearing on his claim. The court also found that the state court's failure to hold an evidentiary hearing would constitute cause for Correll's procedural default if one existed. These holdings are inconsistent with the opinions of other circuit courts and raise the following questions:

1. May a state inmate receive a federal evidentiary hearing on a claim of ineffective assistance of counsel and present evidence never alleged as the basis for the claim in state court?

2. Is the state court's determination that there is no colorable claim of prejudice "cause" for the failure to develop the evidence in state court?

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OPINION BELOW

The panel opinion of the Ninth Circuit Court of Appeals is not yet published; a copy is included in Appendix A. The orders of the district court are not published; they are included in Appendices B and C.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit issued on March 9, 1998. The United States Court of Appeals for the Ninth Circuit denied Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc on May 5, 1998. Petitioners timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

28 U.S.C. § 2254(d) (pre-1996 amendment):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by State court of competent jurisdiction in a proceeding to which the application for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court, on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

On January 28, 1986, the Arizona Supreme Court affirmed Correll's conviction for his participation in a triple homicide and affirmed the death sentences imposed on two of the three convictions. *State v. Correll*, 715 P.2d 721 (1986). On January 27, 1987, Correll filed, with the aid of a volunteer attorney, a petition for post-conviction relief in the Arizona Superior Court. The volunteer attorney noted that it was being filed at that time because the 1-year statute of limitation contained in former A.R.S. § 13-4232 was about to expire, and she requested that the trial court appoint counsel to amend the petition and "set forth petitioner's claims and the basis therefor at the earliest possible date." (Appendix D at D-1.) In the petition, Correll raised a claim of ineffective assistance of counsel regarding sentencing. The entire claim was stated as follows:

> Petitioner received ineffective assistance of counsel at the Sentencing Phase in violation of his rights under the Fifth, Sixth and Fourteenth Amendments. Trial counsel failed to adequately investigate and present mitigating testimony at sentencing despite the fact that petitioner has family members and other persons familiar with petitioner's chaotic, abusive and disruptive upbringing, his commitment to mental institutions in his youth, his severe head injuries, his history of substance abuse or his chemical dependency. Trial counsel did not interview petitioner or properly direct investigation after trial and before the aggravation/mitigation hearing. Counsel did not interview the probation officer who authorized the presentencing report submitted to the court before hearing. Counsel did not conduct any investigation with respect to the contents of the sentencing report. Although counsel told the court at sentencing that he had given the probation officer names of witnesses who wished to make a statement on petitioner's behalf, counsel failed to call those witnesses to testify at the sentencing hearing. No witnesses were called and no evidence presented on petitioner's behalf. Counsel failed to call petitioner as a witness in the aggravation/mitigation hearing in order to elicit such mitigating circumstances as petitioner's physically and mentally abused upbringing, his commitment to mental hospitals, his numerous severe head injuries, his prolonged substance abuse and his mental and emotional problems. Counsel failed to request court appointment of an expert to examine petitioner regarding his

> mental and emotional problems which would have constituted mitigating circumstances. Counsel presented no expert testimony on the effect of substance abuse or chemical dependency on petitioner's intent to commit the crime despite evidence of a history of substance abuse and petitioner's ingestion of alcohol and drugs prior to the crime. Counsel failed to present any evidence at sentencing as to whether a death sentence in petitioner's case would be excessive when compared to sentences imposed for similar crimes and for similar offenders.

(App. at D-2, 3.) While Correll listed several instances wherein he believed counsel failed to either investigate or present evidence of mitigation, nowhere did Correll claim what the evidence would have been.

The trial court appointed counsel to represent Correll. Appointed counsel moved for the appointment of a psychiatric expert pursuant to A.R.S. § 13-4013(B) "for the purpose of assisting in a determination of whether Petitioner was prejudiced by the inaction of defense counsel as alleged." (App. at E-2.) On April 14, 1987, counsel amended the petition to claim that trial counsel had been nothing more than "a neutral observer" at sentencing and therefore prejudice should be presumed. (App. at F-2.) On April 21, 1987, counsel filed an affidavit from Correll stating what trial counsel had done during sentencing, but again did not state any facts concerning the evidence that his counsel had allegedly failed to present. (App. at G-2, 3.)

The State responded to Correll's claim of ineffective assistance at sentencing by noting that Correll had failed to set forth any evidence about what could have been presented. Correll did not directly respond to the State's argument. However, in his third motion for stay of execution, Correll indicated that such information could be provided if the "Gateways Hospital and Mental Health Center" in Los Angeles had additional information and time. (App. at H-1, 2.) In support of his motion for additional time to gather information so he could show prejudice, Correll submitted an affidavit of a probation officer who was familiar with his case. (App. at I-2, 3.) The probation officer indicated that while she was aware of Correll's situation, she did not know the specifics of his commitment to "Gateways."

> Though I do not know the details of Michael's diagnoses or treatment at Gateways, I do know that some proportion of the placements there are related to drug abuse.
>
> . . . .
>
> I know that every inmate committed to the Vacaville facility has a mental health evaluation, and the Department of Corrections almost certainly has records of the 1978 evaluation of Michael Correll. I do not know the contents of that report.

(App. at I-3.) Correll then filed another motion for extension of time, conceding that, based on the present record, he could not prove prejudice:

> Undersigned counsel was informed today by Ms. Frances Hanish, Custodian of Medical Records at Gateways, that her search for records about Petitioner has revealed that Petitioner's file was destroyed in 1986, i.e., after Petitioner was sentenced and before this petition was filed. Thus, ***it appears impossible, at this time, to determine whether or not Petitioner was prejudiced by defense counsel's failure to provide this evidence in mitigation.***

(App. at J-2, emphasis added.) Shortly thereafter, the trial court dismissed the state petition, finding that it failed to state a colorable claim. After the trial court had dismissed the petition, Correll filed an unauthorized supplement to the petition. In the supplement, Correll attached the psychological examination conducted by the California Department of Corrections in 1978. While the report indicated that Correll had an immature personality (severe), it also found that he suffered no major mental disorder:

> Correll is of at least normal intelligence and no severe defects of language or learning were noted. During the interview he was correctly oriented, in good reality contact, and free of manifest psychotic symptoms. His memory is intact for both recent and past events. His thought processes were within normal limits and his associations were relevant.

(App. at K-5.)

On May 22, 1987, Correll filed a motion for reconsideration of the denial of the petition for post-conviction relief. In his motion, Correll objected to the trial court's refusal to allow him to supplement his petition. The trial court denied the motion, and the Arizona Supreme Court denied the petition for review.

Correll then filed the instant federal petition for writ of habeas corpus. One of the claims was ineffective assistance of counsel at sentencing. Correll moved to expand the record beyond the state court record to include, inter alia, an affidavit of Dr. Michael Bayless, a psychologist, and Dr. Leonardo Garcia Bunuel, a psychiatrist. The State objected to the inclusion of this evidence because it was never alleged or presented to the Arizona courts. The district court ruled as follows:

> A reading of the briefs in support of the Rule 32 petition discloses that Petitioner failed to set forth any information which would raise the bare allegations of ineffective assistance to the level of a "colorable claim" under state law. In fact, only four items were provided by Petitioner to substantiate his claims of ineffective assistance. Specifically, Petitioner provided the Rule 32 court with his own affidavit (Photostated Instruments, item 97; (Hereinafter "P.I."); An Affidavit of Susan Curry (P.I. item 100) submitted by Rule 32 counsel in support of his motion for additional time to compile mental health records; Affidavit from Petitioner's Rule 32 counsel (P.I. item 104) indicating that all medical records from Gateways were destroyed in 1986 and nothing remains beyond the fact that Petitioner at one time received treatment; and a psychological evaluation from the California Dept. of Corrections, performed By [sic] one E.S. Birkman, which found Petitioner to have a severe immature personality disorder. (P.I. item no. 106).
>
> Although some of this information related to claims of ineffective representation, it was not sufficient to present a "colorable" claim, primarily because Petitioner failed to provide any indication that he could satisfy both prongs of the *Strickland* test. Even if Petitioner's material provided a basis to question counsel's performance, Petitioner failed to provide any materials documenting what prejudice he suffered. . . .

> The Court finds that Petitioner's motion to expand the record to include the various exhibits to be considered in support of the merits of Petitioner's claims must be denied absent a sufficient demonstration of legitimate cause and actual prejudice. However, the Court will retain and Petitioner may refer to any of the exhibits at issue solely for the purpose of establishing cause and prejudice or a fundamental miscarriage of justice. As in cases of state procedural default or federal abuse of the writ, application of the cause and prejudice test to excuse a state petitioner's failure to adequately present available evidence to the state courts accommodate concerns of finality, comity, and judicial economy.

(App. at B-9, 10.) After the district court found that Correll had failed to present some of the evidence to the state courts, Correll returned to the state court and filed a notice of post-conviction relief in an attempt to exhaust the new evidence. Because it was Correll's second petition for post-conviction relief, he was required to file the petition 30 days after the appointment of counsel or the petition would be dismissed with prejudice. A.R.S. § 13-4234(D). Counsel for Correll failed to file the petition within the required time limits and the state trial court dismissed the petition. (App. at L-1, 2.) The Arizona Supreme Court denied Correll's petition for review.

Ultimately, Correll appealed to the Ninth Circuit, which reversed the district court. The Ninth Circuit held first that the failure of the Arizona trial court to hold an evidentiary hearing was "cause" for the failure to develop the claim:

> Correll properly alleged his counsel's ineffectiveness at sentencing in his Rule 32 state petition for post-conviction relief and requested an evidentiary hearing. This request was denied by the state court. When a state court denies an evidentiary hearing on a colorable ineffective assistance of counsel claim after proper request, a habeas petitioner has fulfilled the *Tamayo-Reyes* "cause" requirement.

(App. at A 1989-90.) *Accord Jones v. Wood*, 114 F.3d 1002, 1012-13 (9th Cir. 1997).

Moreover, the Ninth Circuit rejected the contention that the material facts had to be developed in state court. (App. at A 1992-1993.)

> The state seeks to transform the claim exhaustion requirement into a new requirement for complete presentation of evidence. However, "claim exhaustion" does not equate to "evidence exhaustion," the standards for which were established in *Tamayo-Reyes* and its progeny.

(App. at A 1992 n.2.) The court attempted to distinguish away cases from other circuit courts in which the same issue had been addressed, and noted that those cases dealt with evidence that was available to the inmate during the state proceedings and therefore did not establish a requirement that the "new" evidence first be presented to the state courts.

> Both cases involve questions of whether the petitioner sufficiently showed "cause" under *Tamayo-Reyes* for his failure to present evidence ***available to him during the state court proceedings***.

(App. at A 1993, n.4, emphasis added.) The Ninth Circuit finally concluded:

> It would serve no purpose to require the petitioner to explain a failure to develop material facts in state court if he or she were procedurally barred for failure to develop material facts.

(App. at A 1993.)

The State of Arizona seeks certiorari review to resolve the intercircuit conflict and to clarify the exhaustion requirement.

REASONS WHY THE WRIT SHOULD ISSUE

I

THE NINTH CIRCUIT'S DECISION NOT ONLY CONFLICTS WITH DECISIONS OF THE OTHER CIRCUITS, BUT EVISCERATES THE "FAIRLY PRESENTED" REQUIREMENT BY ELIMINATING THE "FACTUAL EXHAUSTION" COMPONENT.

Under the doctrine of exhaustion, a state prisoner must generally exhaust available state court remedies before filing a habeas corpus action in federal court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). The exhaustion doctrine was codified previously in 28 U.S.C. § 2254(b), which provided:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of a State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

The doctrine reflects the policies of comity and federalism between the state and federal governments, a recognition that "'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" *Picard*, 404 U.S. at 275 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950), *overruled on other grounds by Fay v. Noia*, 372 U.S. 391 (1963)).

The exhaustion doctrine requires a state prisoner to "fairly present" his or her claims to the state courts before a federal court will examine them. *Picard*, 404 U.S. at 275. ***Fair presentation*** of a prisoner's claim to the state courts means that the substance of the claim must be raised there. The prisoner's allegations and supporting evidence must offer the state courts "a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citing *Picard*, 404 U.S. at 276–77). Therefore, although a habeas petitioner will be allowed to present "'bits of evidence'" to a federal court that were not

presented to the state court that first considered his claim, evidence that places the claims in a significantly different legal posture must first be presented to the state courts. *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997) (quoting *Nelson v. Moore*, 470 F.2d 1192, 1197 (1st Cir. 1972)); *Bannister v. Armontrout*, 4 F.3d 1434, 1439 (8th Cir. 1993) ("This means that the federal claim should not present significant additional facts such that the claim was not fairly presented to the state court."); *Stewart v. Nix*, 31 F.3d 741, 743 (8th Cir. 1994) (same).[1]

This was also the state of the law in the Ninth Circuit prior to this Court's opinion in *Tamayo-Reyes*. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988). However, in *Jones v. Woods*, 114 F.3d 1002, 1008 (9th Cir. 1997), and in the instant case, the Ninth Circuit repudiated the "evidence exhaustion" requirement found to exist by every other circuit that has examined the issue:

> The state seeks to transform the claim exhaustion requirement into a new requirement for complete presentation of evidence. However, "claim exhaustion" does not equate to "evidence exhaustion," the standards of which were established in *Tamayo-Reyes* and it progeny.

(App. at A 1992 n.2.) The State believes that the Ninth Circuit was wrong by concluding that *Tamayo-Reyes* changed that part of the exhaustion requirement, and that the other circuit courts have correctly interpreted this Court's holding in *Tamayo-Reyes* to apply to evidence never presented to the state courts.

In *Tamayo-Reyes*, this Court determined the standard a federal court should use when deciding if a habeas corpus petitioner should receive an evidentiary hearing after he failed to develop a material fact in the state court proceedings. Several years earlier, this Court had established six

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1. The Eleventh, Fifth, and Sixth Circuits have similarly concluded that a claim is not fairly presented if the inmate attempts to offer evidence never alleged in state court, *see Mathis v. Zant*, 975 F.2d 1493, 1497 (11th Cir. 1992) (vacating district court judgment granting habeas corpus relief concerning ineffective assistance of counsel at sentencing based on affidavits not presented to the state trial court); *Livingston v. Johnson*, 107 F.3d 297, 306 n.7 (5th Cir. 1997) (inmate not entitled to further factual development when new evidence was not presented to state courts); *Mitchell v. Rees*, 114 F.3d 571, 578 n.11 (6th Cir. 1997) (same).

circumstances wherein a federal court must grant a habeas corpus petitioner an evidentiary hearing, the fifth of which was when "the material facts were not developed at the state-court hearing." *Townsend v. Sain*, 372 U.S. 293, 313 (1963). The *Townsend* court held that a habeas corpus petitioner would not be entitled to a hearing if his failure to develop the facts was attributable to his inexcusable neglect. 372 U.S. at 317. The Court defined inexcusable neglect by pointing to the standard for procedural default in *Fay v. Noia*, 372 U.S. 391, 438–39 (1963), *overruled by Stone v. Powell*, 428 U.S. 465 (1976). *Townsend*, 372 U.S. at 317. *Fay* held that a court could find excusable neglect only where there was a deliberate bypass of the state court procedure. 372 U.S. at 438. The *Tamayo-Reyes* court held that since the *Fay* standard for procedural default had changed to a cause and prejudice standard,[2] a federal court should apply the cause and prejudice standard to determine if a habeas petitioner should get an evidentiary hearing in federal court after he failed to develop a material fact in state court proceedings. *Tamayo-Reyes*, 112 S. Ct. at 1717.

While the *Tamayo-Reyes* decision concerns the issue of when a hearing is required in a federal habeas corpus proceeding, the language the Court used to justify its decision applies to the question of exhaustion when the state court has not had the opportunity to review all of the facts presented to the federal court. *Footman v. Singletary*, 978 F.2d 1207, 1210 (11th Cir. 1992); *Bannister v. Armontrout*, 4 F.3d 1434, 1439–40 (8th Cir. 1993). This Court stated that the adoption of a standard that encourages full factual development of a claim in state court "is fully consistent and gives meaning to the requirement of exhaustion." *Tamayo-Reyes*, 112 S. Ct. at 1720; *Footman*, 978 F.2d at 1210; *Bannister*, 4 F.3d at 1439. Noting that Congress had incorporated "[t]he requirement that state prisoners exhaust state remedies before a writ of habeas corpus is granted by a federal court" in 28 U.S.C. § 2254, this Court declared that "Congress surely meant that exhaustion be serious and meaningful." *Tamayo-Reyes*, 112 S. Ct. at 1720; *Footman*, 978 F.2d at 1210. The Court went on to state that:

> [c]omity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the state must afford the petitioner a full and fair hearing

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2. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 87–88 n.12 (1977).

> on his federal claim, so must the petitioner afford the state a full and fair opportunity to address and resolve the claim on the merits.

112 S. Ct. at 1720. The Ninth Circuit opinion circumvents the clear holding of *Tamayo-Reyes*, and is inconsistent with every other circuit court that has ruled on the issue.

After *Keeney v. Tamayo-Reyes*, every other circuit has found that a state prisoner may not offer and prove *new evidence* in a federal habeas proceeding without first *presenting* the evidence to the state courts. This Court should not allow the Ninth Circuit to circumvent the exhaustion requirement by holding that there is no requirement to exhaust the material evidence upon which a claim is based. The state courts should have the opportunity to rule on the merits of a claim with both the material facts and legal theories presented to them. In this case, Correll's own attorney conceded that he could not show prejudice based on the status of the record before the state court. It was only after Correll filed his federal petition that he offered the affidavits of the two psychiatric doctors that could possibly constitute a colorable showing of prejudice under *Strickland*. The district court clearly did not abuse its discretion by refusing to allow Correll to circumvent the exhaustion requirement by presenting this new evidence. This Court should grant review of this issue to resolve the intercircuit divergence of interpretation of the exhaustion requirement.[3]

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3. The Ninth Circuit found that Correll had made a colorable showing of prejudice based on the following:

> Correll produced evidence indicating a history of mental illness. He proffered the affidavit of Susan Curry, a probation officer who swore that Correll previously had been committed to Gateways Hospital and Mental Health Center, a mental hospital. Correll also presented a report of a detailed psychological examination that the California Department of Corrections had performed in 1978. This report confirmed Correll's three-month commitment at Gateways Hospital and Mental Health Center and further noted that "Correll ha[d] a lengthy mental health history dating from his early teen years," and diagnosed Correll as suffering from a severe immature personality disorder.

(App. at A 1990.) While this evidence does indicate some evidence of mental history, it could not amount to prejudice under *Strickland* because it was not ***new evidence*** because the fact that Correll had a psychological history evidencing a personality disorder was before the state trial court at the time of sentencing and was discussed by the Arizona Supreme Court and rejected as mitigating on appeal. *Correll*, 715 P.2d at 735. Moreover, the California

(continued...)

II

THE NINTH CIRCUIT OPINION FINDING THAT A STATE COURT'S RULING ON A STATE LAW QUESTION CAN BE CAUSE FOR THE FAILURE TO DEVELOP THE EVIDENCE IN STATE COURT CONFLICTS WITH OTHER CIRCUIT COURT RULINGS AND IS INCONSISTENT WITH THE DOCTRINE OF EXHAUSTION.

"Cause" for a procedural default generally involves "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1984). Cause may be established by showing that "the factual or legal basis for a claim was not reasonably available to counsel" or that there was "'some interference by officials that made compliance impracticable.'" *Id.* (quoting *Brown v. Allen*, 344 U.S. 433, 486 (1953)); *see also McCleskey v. Zant*, 499 U.S. 467, 497 (1991) (cause is external impediment such as government interference or reasonable unavailability of claims' factual basis). Ineffective assistance of counsel in state post-conviction proceedings does not constitute cause under federal law. *Coleman v. Thompson*, 501 U.S. 722, 757 (1991) ("Because [petitioner] had no [federal constitutional] right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of [his] claims in state court cannot constitute cause to excuse the default in federal habeas.").

Other circuits, in recognizing the limited nature of "cause," have noted that they will not recognize perceived deficiencies in state-court

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3. (...continued)
Department of Corrections' records were not presented to the state court until after the state trial court had ruled on for post-conviction relief. Even assuming a federal habeas court could consider this evidence, it is insufficient. The only thing these records added was the fact that Correll had a previous diagnosis of severe immature personality disorder. Under Arizona law, mere personality disorders are not mitigating. *State v. Brewer*, 826 P.2d 783 (1992) ("[M]ere character or personality disorder alone is insufficient to constitute a mitigating circumstance."); *State v. Apelt*, 861 P.2d 654 (1993) (normally, some identifiable mental disease or psychological defect must exist before it will be considered as mitigation). Under Arizona law, Correll's diagnosis of a immature personality disorder would not constitute mitigation and the district court did not err by so holding.

post-conviction proceedings as a gateway to open hearings in the federal courts:

> [W]e refuse to transform a federal habeas proceeding into a second trial. In this case an evidentiary hearing would be precisely that. The Supreme Court has charged us to preserve "the state trial on the merits [as] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). We would be unfaithful to this charge if we acted to supplant the state fact-finding process with repetitive federal proceedings.

Eaton v. Angelone, 139 F.3d 990, 995 (4th Cir. 1998). In accordance with these principles, the Seventh Circuit, in *Wright v. Gramley*, 125 F.3d 1038, 1043–44 (7th Cir. 1997), found that the state prisoner had not demonstrated "cause" for his failure to submit affidavits required by state practice. The court noted the difficulties of litigating from prison, but held that the inmate had not at that time made a sufficient showing to warrant a finding of cause:

> We have recognized that prison is a difficult place from which to litigate, much less organize an affidavit from an individual unknown to the petitioner. *See United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987) (acknowledging the difficulty incarcerated petitioners have fulfilling the burden to produce sufficiently precise evidence of what uncalled witnesses would have testified). . . . Mr. Wright, in his pro se brief, explained: "Petitioner, not knowing any of those persons [i.e. the potential witnesses] personally, had no way of finding them to obtain statements from prison, and doing the P[ost] C[onviction] petition from prison, there is no way for petitioner to obtain affidavits pro se." Appellant's Br. at 27. In the district court, he argued that the state post-conviction court should have appointed counsel, concluding: "Counsel could then have sought the affidavits of the witnesses who should have been called at trial." R.11 at 27. These conclusory statements are sufficient to indicate, from the pen of a pro se litigant, that Mr. Wright understood the necessity of explaining the absence of the affidavit. They are not sufficiently specific, however, to fulfill the requirement that Mr. Wright show "cause."

Id.

In *Sellers v. Ward*, 135 F.3d 1333 (10th Cir. 1998), the Tenth Circuit refused to find as cause the misapplication of Oklahoma's post-conviction relief statute by the state courts. The court noted that post-conviction was not constitutionally required, and therefore the error in the state court post-conviction relief proceedings did not excuse the development of the evidence and claim in state court.

> Thus, although Petitioner has presented substantial credible evidence that now and at the time of his trial he suffers from a mental illness that may have bearing upon his factual innocence of the crimes for which he stands convicted, he does not cross the barrier to federal habeas corpus.

135 F.3d at 1339.

Other circuits have also refused to find perceived errors in the state-court proceedings to be cause for the procedural default. In *Weeks v. Bowersox*, 106 F.3d 248, 249 (8th Cir.), *vacated on other grounds en banc*, 119 F.3d 1342 (1997), the Eighth Circuit found that the failure of the state trial court to delineate the features of state post-conviction relief proceedings to a inmate was not cause. In *Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995), the Tenth Circuit rejected a pro per litigant's assertion that his ignorance of the intricacies of Colorado's collateral attack statute was sufficient to establish cause. In *Malone v. Vasquez*, 138 F.3d 711, 719 (8th Cir. 1998), the Eighth Circuit found that the inmate's incarceration in California was not sufficient evidence of interference with his access to Missouri's post-conviction procedures. Likewise, the court found that "mental illness is not cause to excuse his procedural default." *Id.*

The Fifth Circuit, in analyzing whether cause is shown when there is an alleged deficiency in the state post-conviction relief proceeding, has indicated that only if the state procedure is incapable of allowing the inmate to present his claim—a complete absence of corrective process—could constitute cause. *Turner v. Johnson*, 106 F.3d 1178, 1183 (5th Cir. 1997); *Andrews v. Collins*, 21 F.3d 612 (5th Cir. 1994). In *Turner*, the inmate claimed that he was rushed in presenting his evidence and did not have experts to help him. 106 F.3d at 1182-83. The court rejected such an inquiry and stated that the question for cause was "whether any procedural or substantive barriers

precluded a fair presentation of th[e] evidence during the state proceeding." 106 F.3d. at 1183. The court concluded:

> Unless state adjudicatory officials or procedures somehow impeded Turner's ability to submit exhibits and to subpoena and fully question expert witnesses under oath, which the record before us belies, Turner's failure to present this evidence in the state hearing in no way discredits the full and fair nature of that hearing.

106 F.3d at 1184. The Fifth Circuit rejected Turner's claim of cause.

In rejecting Correll's request to expand the record, the district court, without benefit of the Fifth Circuit opinion, nonetheless followed its analysis. First, the court noted that, under *Tamayo-Reyes*, a state court must be given a fair opportunity to recognize a claim as potentially meritorious and based in fact. (App. at B-6, 7.) The district court then analyzed the Arizona post-conviction relief procedures. The district court noted that in Arizona, under Rule 32.5 of the Arizona Rules of Criminal Procedure, Correll was required to raise all known evidence in support of his allegations when he filed his petition for post-conviction relief after the direct appeal. (App. at B-7, 8.)[4] The district court found that the purpose of Rule 32.5 is to consolidate the evidence and to provide for an orderly and thoughtful presentation of claims. (App. at B-7, 8.) The district court found that the rule insured that a court is presented with material information supporting allegations of error, rather than broadly stated motions and requests for additional proceedings. (*Id.*) The district court noted that the rule's importance becomes clear in light of the fact that a Rule 32 petition may be summarily dismissed if it fails to raise a "colorable claim" under state law. A "colorable" claim is raised if a petitioner raises allegations which, if accepted as true, would entitle him to relief. *See State v. Schrock*, 719 P.2d 1049, 1057 (1986). However, an

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4. Rule 32.5 provides, in pertinent part:

> Facts within defendant's personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence ***currently available*** . . . supporting the allegations of the petition ***shall be attached*** to it.

Rule 32.5(a), Ariz. R. Crim. P. (emphasis added). While the Arizona Rules of Criminal Procedure were amended in September 1992, the quoted language remains substantially unchanged from the rule in effect at the time of Correll's Rule 32 petition.

Arizona trial court is not required to hold an evidentiary hearing based upon "mere generalizations and unsubstantiated claims." *State v. Borbon*, 706 P.2d 718, 725 (1985).

The district court determined that, under Arizona law, Correll was required to present more to the state courts than his broad generalizations and unsubstantiated allegations. (App. at B-8.) Correll was required to present some material information which, if accepted as true, would have sustained his burden of proving the ineffective assistance of counsel claims. (*Id.*)

Correll argued that he was improperly denied the opportunity to present his claims and evidence in the state courts The district court agreed that a habeas corpus petitioner must be given a fair opportunity to present his claims and evidence. (App. at B-8.) The district court found unpersuasive Correll's contention that he was entitled to a complete evidentiary hearing in state court. The court found that, while Correll may not have received a state court evidentiary hearing, he did have the opportunity to justify the necessity of such a hearing, and it was his own failure to do so that resulted in the state trial court's summary denial of the Rule 32 petition. (App. at B-8, 9.) After the district court's order, Correll filed a motion for reconsideration wherein he claimed that his cause and prejudice for failure to present his new evidence in the state court was based on the state trial court's refusal to hold a hearing, denial of an investigator and mental health expert, and refusal to grant additional time. The district court rejected Correll's contentions, finding that the state trial court's actions did not constitute objective factors external to the defense:

> Petitioner was denied a hearing because he failed to establish colorable claims of ineffective assistance of counsel or because his claims were procedurally barred. The state court denied Petitioner's motions for appointment of an investigator and a mental health expert because Petitioner failed to show what evidence the investigator and expert were expected to produce, that the evidence was unavailable to trial counsel, and that the evidence could have changed the verdict or sentence. (Ex. J, Mot.. to Dismiss.) Regarding the denial of requests for an extension of time, the state court did grant a motion for additional time to file a supplemental petition and, in fact, doubled the requested time to sixty days. (Pet. Min. E. at 32.)

> Additionally, the Court finds that either the exhibits themselves were in existence before the Petitioner's Rule 32 proceeding or Petitioner could have obtained the information contained in exhibits Petitioner wishes this Court to consider before his Rule 32 proceeding. The transcripts and police investigation records, Exhibits 3, 7, 8, 12 and 15, were clearly in existence and could have been obtained by Petitioner before trial. Exhibit 14, letter dated September 16, 1985, was in existence prior to Petitioner's Rule 32 proceeding. Finally, the information contained in the remaining exhibits was not "new" evidence and could have been developed prior to Petitioner's Rule 32 proceeding. That Petitioner contends he produced some of the affidavits in response to the Rule 32 ruling is not relevant. Rather, the issue is whether the information contained in the affidavits was available or could be obtained, but was not because of some factor external to the defense. Therefore, Petitioner has failed to demonstrate cause for failing to present this evidence to the state court.

(App. at C–8, 9.) The district court's analysis of cause is consistent with the other circuit court opinions cited above and the State believes was a correct resolution of this matter. The Ninth Circuit disagreed.

The Ninth Circuit held that when a state court denies a request for an evidentiary hearing on a claim of ineffective assistance of counsel, a habeas petitioner has fulfilled the "cause" requirement. (App. at A 1990–91.) The only claim of authority for such a proposition was *Jones v. Wood*, 114 F.3d 1002, 1012–13 (9th Cir. 1997). However, in *Jones*, the court noted that Washington state courts will *not permit* inmates to rely on extra-record material in arguing ineffective assistance claims. 114 F.3d 1012–13; *see State v. McFarland*, 127 Wash. 2d 322, 899 P.2d 1251, 1257 (1995). The *Jones* court noted that because extra-record material is frequently crucial in determining the merit of such claims, Jones *could not* have fully developed the facts in state court. *Id.* The holding in *Jones* was nothing more than a finding that the State of Washington lacked a corrective process. Such is not the case in Arizona.

As the district court noted, Arizona's procedure is orderly and ensures the consideration of all evidence. The failure to present the evidence to Arizona courts was Correll's. The state trial court did not err by refusing to

hold a hearing on a claim for which the attorney representing Correll specifically conceded that he could not show prejudice under *Strickland*. Moreover, if the new evidence was material, Correll may have received a hearing when he attempted to exhaust the evidence, but he failed to file a timely petition and his subsequent proceeding was dismissed. Correll, having failed twice to properly allege and plead his evidence in state court, should not be allowed a hearing in federal court to circumvent the state court procedural rules. The Ninth Circuit's finding of cause is not only inconsistent with the other circuits, but is wrong as a matter of the policy of exhaustion. This Court should grant review and reverse the Ninth Circuit's decision.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari and reverse the opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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Chief Counsel
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Attorneys for PETITIONERS

CRM87-1160
[16760]

APPENDICES

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL EMERSON CORRELL,
Petitioner-Appellant,

v.

TERRY L. STEWART, Director, Arizona Department of Corrections,
Respondent-Appellee.

No. 95-99012
D.C. No.
CV-87-1471-PHX-SMM
OPINION

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted
December 8, 1997—Phoenix, Arizona*

Filed March 9, 1998

Before: Mary M. Schroeder, Diarmuid F. O'Scannlain and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Sidney R. Thomas

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that a crimi-

*This case has been reargued and resubmitted per the Orders of this Court of April 14, 1997 and September 25, 1997.

nal defense attorney's penalty-phase failure to present available evidence of a capital defendant's psychiatric history requires an evidentiary hearing on the defendant's federal habeas corpus claim of ineffective assistance of counsel.

Appellant Michael Correll was charged in Arizona state court with three counts of first-degree murder, attempted first-degree murder, kidnapping, armed robbery, and first-degree burglary. The State sought the death penalty.

Prior to trial, Correll moved for a mental examination. While the motion was pending, Judge Howe told defense counsel that in an ex parte conversation, appointed psychiatrist Dr. Garcia-Bunuel had told the judge that there was no point in proceeding with the examination unless the defense had further information. On learning that the defense had no additional information, Judge Howe denied the motion.

In the guilt phase of the trial, defense counsel did not call witnesses, but through cross-examination mounted a defense of misidentification: identification of Correll as the perpetrator by Guy Snelling, a surviving victim, was unreliable due to his ingestion of alcohol and drugs, poor vision, and Correll's physical resemblance to his brother. Defense counsel attempted to overcome the prosecutor's assertion that Correll was present at the crime scene by casting doubt on the reliability of the forensic evidence. A jury convicted Correll as charged.

At the pre-sentencing hearing, defense counsel again called no witnesses and presented no evidence. Although defense counsel alluded to Correll's abandonment by his parents when he was a child, counsel called no witnesses, presented no evidence of mitigation factors, and did not cross-examine the State's witnesses. The trial court found four aggravating factors and no mitigating circumstances, and sentenced Correll to death on each of the murder counts.

The Arizona Supreme Court affirmed, but set aside one of the death sentences on the ground that the trial court had misapplied one of the aggravating circumstances ("cruel, heinous, and depraved" killing).

In a petition for postconviction relief, Correll asserted various constitutional violations, including his right to the effective assistance of counsel during both phases of the trial. The ineffective assistance claim was based on his attorney's failure to develop and present evidence that Correll did not have the requisite mens rea for first-degree murder. Correll did not fault the misidentification defense presented at trial. The trial court denied the petition, and the Arizona Supreme Court denied review.

On federal habeas corpus, Correll alleged 53 constitutional violations at trial. The district court concluded that 26 of the claims were procedurally barred, and granted summary judgment for the State on the remaining claims.

On appeal, Correll contended that: (1) the district should have granted his request for an evidentiary hearing on his ineffective assistance claims; (2) the trial judge's ex parte communication with Dr. Garcia-Bunuel violated his due-process rights; (3) trial testimony by Detective Butch Johnson that he possessed marijuana at the time of his arrest violated his due-process rights; and (4) the Arizona Supreme Court violated his Eighth Amendment rights by reweighing the aggravating and mitigating circumstances in a conclusory manner after invalidating one of the aggravating factors found by the trial court.

[1] To obtain an evidentiary hearing on an ineffective assistance claim, a habeas petitioner must establish that his allegations, if proven, would constitute a colorable claim, thereby entitling him to relief, and the state court has not, after a full and fair hearing, reliably found the relevant facts. [2] In addition, with certain exceptions that were not germane, if the

petitioner has failed to develop material facts in state-court proceedings, he or she must demonstrate adequate cause for his or her failure, and actual resulting prejudice.

[3] Correll assailed his attorney's performance at the guilt phase on two grounds. First, he pointed to his counsel's failure to investigate and develop mens rea defenses. Second, Correll asserted that his attorney mishandled the misidentification theory. To establish a colorable claim, Correll had to demonstrate that his counsel's performance was deficient, and that the deficient performance prejudiced his defense.

[4] Correll's allegations of ineffectiveness for failing to develop a mens rea defense, even if proven, did not support a colorable claim. This defense would have conflicted with the primary defense theory of misidentification. It was within the broad range of professionally competent assistance for Correll's attorney to choose not to present psychiatric evidence that would have contradicted the primary defense theory.

[5] Correll's claim, that he was entitled to a federal evidentiary hearing on his contention that counsel did not present an effective misidentification defense, was barred because he failed to establish cause for his failure to develop the factual basis of this claim in state court. The only guilt-phase theory of ineffectiveness Correll asserted was the alleged failure to develop a mental competency defense. There was no mention of Correll's federal habeas theory that his attorney did not adequately present the misidentification defense.

[6] Correll asserted that during the month between the jury verdict and the pre-sentencing hearing, his attorney met with him for just five minutes. The response to the State's sentencing memorandum devoted barely a page to listing mitigating circumstances, virtually bare of supporting evidence. [7] Correll's attorney failed to call witnesses or present evidence at the pre-sentencing hearing, although he stated that he knew of

people who were willing to testify on Correll's behalf. This almost complete absence of effort to investigate, develop, and present mitigating evidence constituted deficient performance.

[8] Counsel has a duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary. Absent any reasonable investigation into potentially mitigating circumstances and any reasonable tactical explanation, Correll made a colorable claim of ineffective assistance of counsel at sentencing.

[9] Arizona law proscribes a death sentence in the face of mitigating circumstances sufficiently substantial to call for leniency. Because trial counsel failed to present any evidence of Correll's purported mental illness, Correll undermined confidence in the outcome of his sentencing, thereby establishing prejudice.

[10] Correll properly alleged his counsel's ineffectiveness at sentencing in his state petition for postconviction relief and requested an evidentiary hearing. The state cannot successfully oppose a petitioner's request for a state-court evidentiary hearing, then argue in federal habeas proceedings that the petitioner should be faulted for not succeeding. [11] Correll's diligent pursuit of his claim in state court demonstrated that he tried and failed through no fault of his own to develop the facts relevant to his ineffective assistance claim at the state-court level in the only permissible manner.

[12] There was no support for the State's argument that habeas petitioners seeking a federal evidentiary hearing must make a threshold showing of exhaustion before the "cause and prejudice" test can be employed. Exhaustion requirements are founded on concerns of federalism and comity; they are not concocted simply to lead petitioners into a federal habeas cul-de-sac.

[13] A cornerstone of Correll's claim of ineffective assistance of counsel at sentencing was his attorney's failure to

proffer significant psychiatric evidence. Because Judge Howe received no evidence of Correll's psychiatric state as a mitigating factor, there was no basis for leniency against which the ex parte communication could have weighed. There was thus no evidence that the error, if any, prejudiced Correll by working to his actual and substantial disadvantage. [14] Judge Howe did not consider the communication in weighing the aggravating and mitigating factors.

[15] Correll did not demonstrate the existence of some objective factor external to the defense that impeded counsel's efforts to comply with the State's procedural rule. After the trial court imposed Correll's death sentence, he had all the information necessary to pursue a claim. The mere ignorance or inadvertence of counsel did not furnish sufficient cause to excuse a procedural default. Correll could not make the requisite showing that his sentence would have been different absent the error. [16] His claim did not warrant federal habeas review.

[17] To the extent that Johnson's testimony about Correll's possession of marijuana linked Correll to Snelling's mobile home, the evidence proved essential elements of the prosecution's case—Correll's opportunity to commit the crimes charged and his identity as the culprit. This evidence was admissible under the Arizona Rules of Evidence. Even if the evidence had no bearing on any element of the prosecution's case, its admission did not create a due-process violation by rendering the trial fundamentally unfair. The prosecution elicited just one mention of the marijuana, and that testimony was relatively sterile. It was highly improbable that the error, if any, had substantial and injurious effect or influence in determining the jury's verdict.

[18] The independent and adequate state grounds doctrine prohibits federal habeas review when a state court declined to address a prisoner's federal claims because the prisoner failed to meet a state procedural requirement. Such a prohibition

applied in this case. The Arizona trial court found that Correll had raised no colorable issues relating to ineffective assistance of counsel, and ruled that his remaining claims were precluded or waived, citing Arizona statutes. By invoking state-law procedural grounds for its dismissal, the trial court barred later federal review of those claims on the merits.

[19] To overcome the resulting procedural default, Correll had to establish cause for the default and actual prejudice as a result of the alleged violation of his Eighth Amendment rights. Correll failed to do so. Nor could Correll demonstrate that the Arizona Supreme Court's reweighing analysis actually prejudiced him. The court affirmed the trial court's finding of three aggravating factors, as well as the trial court's finding that no mitigating factors existed. The Arizona Supreme Court had ample grounds for affirming Correll's death sentence.

[20] Even if Correll's procedural default were ignored, he could not prevail on the merits of his Eighth Amendment claim. [21] In a "weighing" state such as Arizona, when a trial court decides to impose a death sentence on the basis of both valid and invalid aggravating factors, a state appellate court can cure the error by either performing harmless-error review, or reweighing the mitigating evidence against the remaining valid aggravating factors. [22] In addition to independently reweighing the remaining valid aggravating factors against the mitigating circumstances, the Arizona Supreme Court provided a principled explanation of what it did.

[23] To the extent that Correll's claim, that the Arizona Supreme Court's reduction of one death sentence to life imprisonment eviscerated the factual basis for the trial court's finding of aggravating factors, was subsumed in his main Eighth Amendment claim, it was procedurally defaulted. To the extent that the claim lay outside his main Eighth Amendment claim, Correll did not raise the former claim in his state postconviction petition, thereby procedurally defaulting it.

[24] Nor were the merits of the claim strong. A state court's finding of aggravating circumstances is arbitrary and capricious only if no rational factfinder could have reached the same conclusion. The Arizona Supreme Court's findings did not defy rationality. A rational factfinder could have found that Correll was involved in the murders to eliminate witnesses and with the expectation of pecuniary gain.

[25] No invalid considerations underlay the Arizona Supreme Court's evaluation of the "cruel, heinous, depraved" aggravating factor. A rational factfinder could have reached the same conclusion based on the evidence of cruelty, heinousness, and depravity the court considered.

COUNSEL

Brian R. Dando, Phoenix, Arizona, and Charles J. Muchmore, Muchmore & Wallwork, Phoenix, Arizona, for the petitioner-appellant.

Paul J. McMurdie, Office of Attorney General, Criminal Appeals Section, Phoenix, Arizona, for the respondents-appellees.

OPINION

THOMAS, Circuit Judge:

Michael Emerson Correll was sentenced to death for participating in the execution-style shooting of three innocent victims in the Arizona desert. Convicted of first-degree murder, attempted first-degree murder, kidnapping, armed robbery, and first-degree burglary, he appeals the district court's denial of habeas corpus relief. We affirm the district court on all counts, except Correll's claim that he is entitled to a federal

evidentiary hearing as to whether his trial counsel ineffectively assisted him at sentencing.

I.

At approximately 12:30 a.m. on the morning of April 12, 1984, Guy Snelling and his companion, Debra Rosen, returned to the mobile home where Snelling resided after attending a Wang Chung concert. Throughout the preceding evening, Snelling had been drinking bourbon, and had consumed both cocaine and marijuana. Soon after Snelling and Rosen had gone to bed, John Nabors, Snelling's co-worker, knocked at the door of the mobile home, saying "Guy, it's me, John, I've got to talk to you—I've got to see you." When Snelling answered the door, he encountered Nabors and a man whom Nabors introduced as his friend, Rick. Snelling later identified "Rick" as Michael Correll.

Snelling let Nabors and Rick into the mobile home. Nabors asked Snelling if he had any speed and if he had a gun. After Snelling answered negatively, Nabors produced a gun, cocked it, aimed it at Snelling, and said "I hate to do this — I know you've got some money." At Nabors' direction, Snelling summoned Rosen and told her "we're being robbed." Rick secured Snelling's and Rosen's hands and feet with duct tape. Soon thereafter, a car pulled up to the mobile home, frightening Nabors and Rick. Nabors dragged Rosen into a bedroom while Rick remained with Snelling.

The occupants of the car were Robin Cady, who rented a room from Snelling, and her companion, Shawn D'Brito. When Cady and D'Brito entered the mobile home, Nabors held the gun up to Snelling's head and told the couple, "You guys just walked into a whole bunch of shit." Rick taped Cady's and D'Brito's hands and feet. Then, Nabors and Rick escorted Snelling throughout the mobile home, retrieving marijuana and approximately $4,700 in cash from various rooms and from Rosen's and Cady's purses.

About forty-five minutes later, Nabors and Rick forced Snelling, Cady, and D'Brito into Snelling's car. While Rick sat in the driver's seat, holding the gun, Nabors returned to the mobile home, explaining that he was going to "tape Debbie up a little better." When Nabors returned to the car, Rick drove the car to a deserted area nearby, where Nabors' truck was parked. Nabors got into his truck and, with Rick following in the car, drove to a desert area north of Phoenix. Nabors and Rick pulled Snelling, Cady, and D'Brito out of the car and forced them to lie on the ground. Rick told Snelling, "I'm going to have to knock you out now," and shot him in the head. The bullet entered Snelling's left earlobe, passed down the skull, chipped the vertebrae between the trachea and esophagus and came to rest in his jawbone. Miraculously, not only did Snelling survive, but he remained conscious and fully aware of his surroundings.

Meanwhile, Nabors had taken the gun. As Snelling watched, Nabors killed D'Brito and tried to shoot Cady, but the gun misfired. Cady pleaded for her life, but Nabors got down on one knee and told her, "Now, girl, just hold still," and finally succeeded in shooting her.

After Nabors and Rick had left, Snelling freed himself and ran to Cady. Seeing that she was swallowing her tongue, he ran to the nearest residence to call his parents, who lived in a house next to his mobile home. Snelling told his mother that he had been shot in the head, and asked her to go next door and rescue Rosen before Nabors and Rick could return to harm her. Unfortunately, Snelling's parents found Rosen already dead from strangulation. Snelling also contacted the police and described both Nabors and Rick. The officers found Snelling "extremely excited," but "definitely coherent." They found D'Brito and Cady dead from gunshot wounds to the head.

While Snelling was hospitalized for his injury, the police showed him two photographic lineups. One of the lineups

contained a photograph of Nabors, whom Snelling identified as one of his assailants. About a week later, a police detective showed Snelling another photographic lineup containing a photograph of Michael Correll, whom Snelling identified as the second assailant.

On April 20, 1984, Michael Correll was apprehended at his father's residence in Las Vegas, Nevada, where he had fled. In addition to Snelling's lineup identification, the evidence incriminating Correll included a photographic lineup identification by a taxi driver who recalled picking up Correll from a Phoenix hotel on April 13 and driving him to the airport; boot prints that Correll had left at the crime scenes; Correll's known association with Nabors and his use of the alias "Rick Watson"; and a recorded phone call that Correll's brother, Terry, had placed to Correll in Nevada at the request of the police. During this call, Terry informed Correll that Nabors had been found dead in a hotel room after a police shootout, resulting in the following exchange:

> Mike: Okay, uh, they don't know who I am.
>
> Terry: Yeah, they don't?
>
> Mike: Uhhuh (no)
>
> Terry: Okay, right on.
>
> Mike: Okay. Right on. Is it safe back there?
>
> Terry: Um, probably not., haha, but you know um, because you know, um, I guess whoever, who, you know, whoever was used, you know, you're worried about is uh, um is pretty mad at you too.
>
> Mike: well, they don't know, they don't know (unintelligible) who I am.

Terry: Yeah, but one of the guys is still alive.

Mike: Right, well, he won't, he won't be for long.

Terry: Okay, well, I guess, you know.

Mike: I'll take care of business there.

Correll was subsequently charged with three counts of first degree murder, one count of attempted first degree murder, one count of first degree burglary, one count of armed robbery, and four counts of kidnapping.

Before Correll's trial began, Correll unsuccessfully moved for the appointment of new counsel, asserting that he and his court-appointed attorney did not "see eye to eye on matters in the case." In addition, Correll moved to suppress evidence, including marijuana, that the police had seized from his car and the Las Vegas apartment at the time of his arrest. After the prosecution agreed not to offer as evidence any of the items the suppression motion covered, the court dismissed the motion as moot. Finally, Correll moved for a mental examination pursuant to Ariz. R. Crim. P. 11. During a colloquy with the prosecution and defense counsel concerning this motion, the trial judge, Judge Howe, stated:

> I got a call from Dr. Garcia [the court-appointed psychiatrist] Friday. He looked at Mr. Correll and said he is, in Dr. Garcia's word, antsy, but he has no pathology of any sort to indicate that there is any mental difficulty or that there ever has been and he sees no grounds for proceeding with the Rule 11 unless you have some other information.

When he learned that the defense had no further information, Judge Howe denied the Rule 11 motion, observing: "Your [sic] are disgustingly healthy, Mr. Correll, mentally at least, according to Dr. Garcia."

Correll's trial began on October 16, 1984, and lasted for three days. Rather than calling any witnesses for the defense, Correll's attorney sought through cross-examination to present a defense of misidentification — namely, that Snelling had wrongly identified Correll as one of his assailants, and that it was reasonably likely that Correll's brother Terry, who resembled Correll, had committed the crimes in Correll's stead. Of the twenty witnesses the prosecution called, Correll's attorney cross-examined eleven. His questioning focused on two areas. First, he directly attacked the reliability of Snelling's identification. He elicited testimony from Snelling regarding the alcohol and drugs that Snelling had consumed during the evening preceding the murders, available sources of light during the crimes, and the acuity of Snelling's vision, with and without the glasses he customarily wore. Correll's attorney also cross-examined Terry Correll about his resemblance to his brother. Second, Correll's counsel attempted to discount the physical evidence of Michael Correll's presence at the crime scenes by casting doubt on the reliability of the boot prints, pointing out that Correll's fingerprints had not been found in Snelling's mobile home, and establishing that it was impossible to determine the date of the fingerprints Correll had left inside Nabors' truck.

The jury found Correll guilty on all counts. At Correll's November 23, 1984 pre-sentencing hearing, which lasted twenty-three minutes, his counsel again called no witnesses and presented no evidence. Correll's attorney had submitted a brief sentencing memorandum devoting less than one page to mitigating circumstances, and failing to discuss Correll's psychiatric condition at the time of the murders.

Similarly, his argument at sentencing occupied roughly eight transcript pages and, beyond a passing allusion to the fact that Correll's parents had abandoned him when he was fourteen years old, made no reference to Correll's psychiatric condition. Correll's counsel again failed to call any witnesses or produce any evidence. He declined to cross-examine the

State's witness. At the conclusion of the brief hearing, Judge Howe found four aggravating circumstances and no mitigating circumstances, and sentenced Correll to death on each of the murder counts.

On direct appeal, the Arizona Supreme Court affirmed Correll's convictions. However, in its January 28, 1986 opinion, the court concluded that the trial court had erred in determining that Correll had intended to kill Debra Rosen, and that the aggravating circumstance stemming from the commission of "one or more other homicides" had been wrongfully applied retroactively in Correll's sentence. Accordingly, the Arizona Supreme Court modified Correll's death sentence for the murder of Debra Rosen to a sentence of life imprisonment and invalidated the "other homicides" aggravating factor. *See State v. Correll*, 715 P.2d 721, 730-31, 734-35 (Ariz. 1986). After reweighing the remaining aggravating circumstances against Correll's claimed mitigating factors, the court affirmed Correll's other three death sentences. *Id.* at 736.

On January 27, 1987, Correll timely filed a petition for post-conviction relief pursuant to Ariz. R. Crim. P. 32. In this petition, Correll asserted multiple violations of his constitutional rights, including his right to the effective assistance of counsel during the guilt and penalty phases of his trial, his right to confrontation, and his right to reliability in capital sentencing. Correll's claim of ineffective assistance of counsel during the guilt phase of his trial was based upon his attorney's failure to investigate his mental state at the time of the offense and to develop and present evidence that he did not have the requisite mens rea for first degree murder. Correll did not claim that his counsel was ineffective for mishandling the misidentification defense actually presented at trial. Correll later filed five supplements to his petition, adducing evidence of his mental impairment and his attorney's ineffectiveness. On May 14, 1987, the trial court summarily dismissed Correll's petition. Correll's motion for rehearing

was subsequently denied, and the Arizona Supreme Court denied review without comment on July 8, 1987.

On September 15, 1987, Correll filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. Correll alleged fifty-three constitutional violations at trial, at sentencing, and during the appeal process. On July 22, 1993, the district court deemed twenty-six of Correll's claims to be procedurally barred. On March 1, 1995, in an 82-page opinion, the district court entered summary judgment against Correll on his remaining constitutional claims. On March 27, 1995, the district court denied Correll's motion under Fed. R. Civ. P. 59 to alter or amend its summary judgment order. Correll timely appealed to this court on April 25, 1995.

On appeal, Correll asserts four main claims: 1) he disputes the district court's denial of his request for an evidentiary hearing on his ineffective assistance of counsel claims; 2) he alleges that the trial judge's informal *ex parte* communication with the court-appointed psychiatric expert, Dr. Garcia-Bunuel, violated his due process rights under *Gardner v. Florida*, 430 U.S. 349 (1977); 3) he asserts that testimony at trial that he had possessed marijuana at the time of arrest violated his due process rights; and 4) he argues that the Arizona Supreme Court violated his Eighth Amendment rights by reweighing the aggravating and mitigating circumstances in a conclusory manner after invalidating one of the aggravating circumstances the trial court had found.

We review de novo a district court's grant of summary judgment denying a writ of habeas corpus. *Jones v. Wood*, 114 F.3d 1002, 1008 (9th Cir. 1997). Because Correll's petition was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-122, 100 Stat. 1214, the provisions of the Act do not apply to this case. *Jeffries v. Wood*, 114 F.3d 1484, 1495-1496 (9th Cir. 1997) (en banc); *accord Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct 2059, 2068 (1997).

II.

[1] Correll argues the district court should have granted him an evidentiary hearing on his ineffective assistance of counsel claims. To obtain an evidentiary hearing on an ineffective assistance of counsel claim, a habeas petitioner must establish that (1) his allegations, if proven, would constitute a colorable claim, thereby entitling him to relief and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. *Jones*, 114 F.2d at 1010; *Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992).

[2] In addition, with certain exceptions not germane to this appeal, if the petitioner has failed to develop material facts in state court proceedings, he or she must demonstrate adequate cause for his or her failure and actual prejudice resulting from that failure. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992).

A.

[3] Correll assails his attorney's performance at the guilt phase of his trial on two grounds. First, Correll points to his counsel's failure to investigate and develop mens rea defenses based on Correll's psychiatric history and his substance abuse on the night of the murders. Second, Correll asserts that his attorney mishandled the misidentification theory presented in Correll's defense. To establish a colorable claim of ineffective assistance of counsel, Correll must demonstrate that his counsel's performance at trial was deficient, and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[4] Under this standard, Correll's allegation of ineffectiveness for failing to develop a mens rea defense, even if proven, does not support a colorable claim. This defense would have conflicted with the primary defense theory of misidentification. Thus, it was within the broad range of professionally competent assistance for Correll's attorney to choose not to

present psychiatric evidence which would have contradicted the primary defense theory. *See United States v. Stern*, 519 F.2d 521, 524-25 (9th Cir. 1975) (failure to pursue an insanity defense which conflicted with principal defense theory not ineffective assistance of counsel).

[5] Correll further argues that he is entitled to a federal evidentiary hearing on his contention that his counsel did not present an effective misidentification defense. However, this claim is barred because he has failed to establish cause for his failure to develop the factual basis of this claim in state court. *See Tamayo-Reyes*, 504 U.S. at 11. True, Correll's petition for state post-conviction relief filed pursuant to Ariz. R. Crim. P. 32 asserted guilt-phase ineffective assistance and demanded an evidentiary hearing. However, the only guilt-phase theory of ineffectiveness Correll asserted was the alleged failure to develop a mental competency defense. There is no mention of Correll's federal habeas theory that his attorney did not adequately present the misidentification defense, either in the Rule 32 petition itself or in the five supplements to the petition he subsequently filed. Correll and his post-conviction attorney had access to all the necessary information for raising this issue and for conducting a state-court evidentiary hearing. Because no legitimate cause prevented Correll from developing the material facts underlying this portion of his ineffectiveness claim in state court, we decline to order a federal evidentiary hearing on defense counsel's deficiencies in handling Correll's misidentification defense.

Correll argues that the cause and prejudice requirement does not apply because the *Tamayo-Reyes* rule is restricted to cases in which petitioners received a state-court hearing. Contrary to Correll's argument, *Tamayo-Reyes* endorses no such general limitation, although there are exceptions, as we found in *Chacon v. Wood*, 36 F.3d 1459, 1465-66 (9th Cir. 1994).[1]

[1]*Tamayo-Reyes* modified *Townsend v. Sain*, 372 U.S. 293 (1963), which established six circumstances under which a federal district court was

B.

Correll further argues that the district court erred in denying him an evidentiary hearing on his claim of ineffective assistance of counsel at sentencing. We agree.

[6] Correll's allegations, if taken as true, constitute a colorable claim of ineffective assistance of counsel. Correll asserts that during the month that elapsed between the jury verdict and the pre-sentencing hearing, his attorney met with him for just five minutes. Furthermore, the seven-page response to the state's sentencing memorandum that Correll's attorney submitted before the pre-sentencing hearing devoted barely a page to listing mitigating circumstances, virtually bare of any supporting evidence.

[7] Similarly, the transcript of the pre-sentencing hearing reveals that Correll's attorney failed to call witnesses or present any evidence at the pre-sentencing hearing, although he stated on the record that he knew of people who were willing to testify on Correll's behalf. Neither in the pre-sentencing memorandum nor during the pre-sentencing hearing did Correll's attorney raise Correll's psychiatric history or condition at the time of the crimes as a potential mitigating factor, apart from alluding in passing to the fact that Correll's parents had abandoned him when he was fourteen years old. This almost complete absence of effort on the part of Correll's counsel to investigate, develop, and present mitigating evidence, including evidence of Correll's psychiatric history and his condition

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required to hold an evidentiary hearing on habeas claims. *Id.* at 313. *Tamayo-Reyes* considered one of those circumstances, namely when the material facts were not developed at the hearing, and held that a petitioner must show cause for failing to develop the facts and prejudice resulting therefrom. In relevant part, *Chacon* held that the cause and prejudice requirement did not apply to the fourth *Townsend* circumstance, newly discovered evidence, because if the evidence is truly "newly discovered," it could not have been presented to the state court in the first instance. The *Chacon* exception is not at issue in this case.

at the time of the murders, constitutes deficient performance "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690.

[8] To be sure, failure to present mitigating evidence at a capital sentencing hearing does not always constitute ineffective assistance of counsel. *See Darden v. Wainwright,* 477 U.S. 168, 186 (1986). However, this decision should be the product of a reasoned choice. Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. Confronted with facts similar to this case in *Evans v. Lewis,* 855 F.2d 631 (9th Cir. 1988), we concluded that counsel's assistance was constitutionally ineffective. *Id.* at 636-39. Thus, absent any reasonable investigation into potentially mitigating circumstances and any reasonable tactical explanation, we must conclude Correll has made a colorable claim of ineffective assistance of counsel at his capital sentencing.

[9] In addition, we find that Correll has satisfied the "prejudice" prong of the *Strickland* test. Arizona law proscribes a sentence of death in the face of "mitigating circumstances sufficiently substantial to call for leniency." *See* Ariz. Rev. St. § 13-703(E). Thus, because trial counsel failed to present any evidence of Correll's purported mental illness which may have satisfied Ariz. Rev. St. § 13-703(E), Correll has "undermine[d] confidence in the outcome" of his sentencing, thereby establishing the requisite *Strickland* prejudice. *Strickland,* 466 U.S. at 694-96.

[10] Despite the colorable claim of ineffective assistance that Correll has asserted, the state argues that under *Tamayo-Reyes* Correll is not entitled to a federal evidentiary hearing on this claim because he failed to develop the material facts surrounding the claim at the state-court level. The facts do not support the state's position. Correll properly alleged his counsel's ineffectiveness at sentencing in his Rule 32 state petition

for post-conviction relief and requested an evidentiary hearing. This request was denied by the state court. When a state court denies an evidentiary hearing on a colorable ineffective assistance of counsel claim after proper request, a habeas petitioner has fulfilled the *Tamayo-Reyes* "cause" requirement. Simply put, the state cannot successfully oppose a petitioner's request for a state court evidentiary hearing, then argue in federal habeas proceedings that the petitioner should be faulted for not succeeding.

The procedural history is replete with evidence of Correll's assiduous attempts to develop the theory that his counsel provided ineffective assistance at sentencing. In his Rule 32 petition, Correll alleged that his trial counsel was ineffective for failing to investigate and present available evidence of mitigating circumstances at sentencing, including evidence of his mental health history and his psychiatric condition at the time of the murders. In supplemental materials submitted in support of his Rule 32 petition, Correll observed that his trial attorney had not requested a mental health diagnostic examination before sentencing pursuant to Ariz. R. Crim. P. 26.5, despite having previously deemed it necessary to move for the appointment of a mental health expert pursuant to Ariz. R. Crim. P. 11 to explore Correll's competency to stand trial.

Correll produced evidence indicating a history of mental illness. He proffered the affidavit of Susan Curry, a probation officer who swore that Correll previously had been committed to Gateways Hospital and Mental Health Center, a mental hospital. Correll also presented a report of a detailed psychological examination that the California Department of Corrections had performed in 1978. This report confirmed Correll's three-month commitment at Gateways Hospital and Mental Health Center and further noted that "Correll ha[d] a lengthy mental health history dating from his early teen years," and diagnosed Correll as suffering from a severe immature personality disorder.

In addition to requesting an evidentiary hearing on his ineffectiveness claim in several of the supplements to his initial Rule 32 petition, Correll moved the court to appoint and order compensation for a mental health expert to assess Correll's psychiatric condition and for an investigator to assist in locating persons and records. In response, Judge Howe denied Correll's motions for the appointment of a mental health expert and an investigator, asserting that "[t]he mental health materials petitioner describes in his present pleadings were dated and superseded by contemporaneous Rule 11 proceedings." Judge Howe further ruled that Correll's claim of ineffective assistance of counsel was not colorable and summarily dismissed Correll's petition for post-conviction relief, denying Correll's repeated request for an evidentiary hearing.

[11] Although denial of a state evidentiary hearing after proper presentation of a colorable claim would be sufficient to fulfill the "cause" requirement of *Tamayo-Reyes,* Correll's diligent pursuit of his claim in state court demonstrates he "tried and failed through no fault of his own to develop the facts relevant to his ineffective assistance claim at the state-court level in the only permissible manner." *Jones,* 114 F.3d at 1012-13. Indeed, the actions of the state court divested Correll of any meaningful opportunity to present this evidence at the state level.

Accordingly, the state cannot now insist the obstacle it placed in Correll's path when he sought a state-court hearing and the means to present evidence at that hearing should again prevent Correll from securing a federal evidentiary hearing. *See Jones,* 114 F.3d at 1012-13 (finding that petitioner established cause for failure to develop facts on ineffectiveness claim at state level, because state court dismissed his personal restraint petition containing ineffectiveness claim without a hearing).

Because it is coextensive with the prejudice prong of *Strickland*, the *Tamayo-Reyes* prejudice requirement has also been satisfied in this case.

C.

[12] At oral argument, the state contended that *Tamayo-Reyes* requires habeas petitioners seeking a federal evidentiary hearing to make a threshold showing of exhaustion before the "cause and prejudice" test could be employed.[2] There is no support for this misguided theory in *Tamayo-Reyes*, nor in any case cited by the state.[3] Under the state's hypothesis, petitioners would be absolutely barred from seeking a federal evidentiary hearing if the material facts had not been developed in state court. Under this theory, of course, the petitioners would always lose because the *Tamayo-Reyes* rule presumes a failure to develop facts fully in state court. Indeed, the "cause" prong of *Tamayo-Reyes* requires the petitioner to provide an adequate reason why the material facts were not

[2]This purported requirement differs from and would be in addition to the traditional requirement that a federal habeas petitioner must have exhausted his state remedies as to the particular claim he or she is asserting. *See* 28 U.S.C. § 2254(b) (1995). The state seeks to transform the claim exhaustion requirement into a new requirement for complete presentation of evidence. However, "claim exhaustion" does not equate to "evidence exhaustion," the standards for which were established in *Tamayo-Reyes* and its progeny.

[3]The state cites *Wright v. Gramley*, 125 F.3d 1038 (7th Cir. 1997) and *Livingston v. Johnson*, 107 F.3d 297 (5th Cir. 1997). However, neither case mentions, much less embraces, an additional threshold exhaustion requirement. To the contrary, both cases employ the traditional *Tamayo-Reyes* cause and prejudice analysis. Neither court dismissed the appeal for failure to exhaust state remedies. In supplemental submissions, the state claims support from *Mitchell v. Rees*, 114 F.3d 571 (6th Cir. 1997) and *Schneider v. Delo*, 85 F.3d 335 (8th Cir. 1996). Both *Mitchell* and *Schneider* support the traditional *Tamayo-Reyes* cause and prejudice test as we have articulated here. Neither contain any support for a modification of *Tamayo-Reyes* to include an additional threshold exhaustion requirement.

developed in state court. The state's reasoning is not only directly contrary to *Tamayo-Reyes,* but to common sense as well. Exhaustion requirements are founded on appropriate concerns of federalism and comity; they are not concocted simply to lead petitioners into a federal habeas cul-de-sac.

Continuing this argument, the state also contends that to show exhaustion petitioners must demonstrate that they had presented *all* the evidence in state court that they sought to present in federal court. Obviously, this interpretation would render the *Tamayo-Reyes* cause and prejudice rule entirely superfluous. Again, the state's logic is circular. It would serve no purpose to require the petitioner to explain a failure to develop material facts in state court if he or she were procedurally barred for failure to develop material facts. In claiming that the prerequisite to the cause and prejudice rule is the full development of facts in state court proceedings, the state turns the *Tamayo-Reyes* decision on its head.[4] Thus, we reject this eversion of *Tamayo-Reyes.*

D.

In sum, we hold that Correll is not entitled to an evidentiary hearing on his attorney's purported guilt-phase ineffectiveness. However, Correll is entitled to an evidentiary hearing on the issue of his attorney's alleged ineffectiveness at the sentencing phase of his trial. Because he will receive an evidenti-

[4]For support, the state again turns to *Wright* and *Livingston*. However, once again, neither case offers any comfort. Both cases involve questions of whether the petitioner sufficiently showed "cause" under *Tamayo-Reyes* for his failure to present evidence available to him during the state court proceedings. Thus, neither *Wright* nor *Livingston* add any additional requirements to the *Tamayo-Reyes* cause and prejudice test. In neither case did the court dismiss for failure to exhaust. On the contrary, the *Wright* and *Livingston* courts applied *Tamayo-Reyes* and determined the petitioner had not demonstrated cause. In fact, the *Wright* court remanded the case to the district court so that the petitioner could have the opportunity to establish cause. *Wright,* 125 F.3d at 1043.

ary hearing, Correll's appeal of the district court's denial of his request to expand the record is moot. Our decision also makes it unnecessary to decide whether the district court erred in rejecting Correll's funding request for experts and investigatory expenses as premature.

III.

Correll argues that his death sentence violated his due process rights because of the *ex parte* conversation between Judge Howe and Dr. Garcia-Bunuel. *See Gardner v. Florida*, 430 U.S. 349 (1977) (finding that petitioner was denied due process when death sentence was imposed on basis of information which was not fully disclosed to defense counsel). According to Correll, this informal communication could have contributed to the judge's ultimate conclusion that Correll's psychiatric status did not yield any mitigating factors. As such, this conversation could have influenced Judge Howe's decision to sentence Correll to death. We disagree.

Correll failed to assert his *Gardner* due process claim in any state court proceeding, whether as an element of his direct appeal[5] or as a basis for post-conviction relief. Accordingly, this claim was procedurally defaulted in state court. Thus, we need not address the merits of his claim on habeas unless he establishes cause for his failure and actual prejudice. *See Pope v. Zenon*, 69 F.3d 1018, 1026 (9th Cir. 1995).[6] In this case, Correll has not made the requisite showing.

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[5]Correll contends that the Arizona Supreme Court addressed his *Gardner* claim, citing *State v. Correll*, 715 P.2d 721, 729 (1986). However, after carefully reviewing the Supreme Court's opinion in its entirety, we are unable to find any reference to Correll's *Gardner* claim.

[6]We distinguish Correll's situation from a failure to exhaust state remedies, which would compel us to dismiss Correll's habeas petition as unexhausted if he had a currently available state remedy at the time of the federal petition. *See Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982). When Correll filed his habeas petition on September 15, 1987, he had no

[13] First, Correll has not borne his burden of demonstrating actual prejudice. To fulfill this burden, he must establish "not merely that the errors at his trial constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). This Correll cannot do. As we have already discussed, a cornerstone of Correll's claim of ineffective assistance of counsel at sentencing is his attorney's failure to proffer significant psychiatric evidence. Because Judge Howe received no evidence of Correll's psychiatric state as a mitigating factor, there was no basis for leniency against which the *ex parte* communication — which purported to show that Correll suffered from no mental impairments — could have weighed. Thus, we can find no evidence that the *Gardner* error, if any, prejudiced Correll by working to his "actual and substantial disadvantage."

[14] By contrast, in *Gardner*, the sentencing judge relied on a presentence investigation report which was not fully disclosed to defense counsel, and the judge did not state on the record any information about the confidential portion of the presentence report. Accordingly, there was no opportunity for the defense attorney to challenge the accuracy or materiality

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recourse in state court for his *Gardner* due process claim. He could no longer seek direct review in the Arizona Supreme Court, because the deadline for filing a motion for reconsideration of the court's decision affirming his convictions and sentence, February 15, 1986, had long passed. Nor could he obtain review through state collateral relief: the July 23, 1987 deadline for filing a motion for reconsideration of the Arizona Supreme Court's decision affirming the trial court's denial of rehearing of its decision to dismiss Correll's petition for post-conviction relief had aiso passed. *See* Ariz. R. Crim. P. 31.18(b) ("Any party desiring reconsideration of a decision of an appellate court may file a motion for reconsideration in the appellate court within fifteen days after the filing of a decision by the appellate court."). Consequently, we find that Correll's *Gardner* claim has been exhausted, *see Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1992).

of the information. *Gardner*, 430 U.S. at 353-56. In *McKenzie v. McCormick*, 27 F.3d 1415 (9th Cir. 1994), we interpreted *Gardner* as conditioning a finding of constitutional error on two factors: the relevance of the *ex parte* communication to sentencing and the reliance the judge placed on the communication in making a sentencing decision. Here, Judge Howe specifically did not consider the communication in weighing aggravating and mitigating factors, as we have already explained. Nor does the mere fact of communication between Judge Howe and Dr. Garcia-Bunuel in itself "overcome the presumption of constitutional correctness accorded final state judgments of conviction and sentence." *McKenzie*, 27 F.3d at 1420.

[15] Second, Correll has not demonstrated the existence of "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). After the trial court had imposed Correll's death sentence, he had all the necessary information to pursue a claim under *Gardner*. The mere ignorance or inadvertence of Correll's counsel does not furnish sufficient cause to excuse a procedural default. *See Murray*, 477 U.S. at 486-87. While ineffective assistance of counsel may constitute cause, *see id.* at 488, we find that the circumstances of Correll's representation do not sink to the level of ineffectiveness under *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (holding that to establish ineffective assistance, petitioner must show reasonable probability that but for counsel's errors, result of proceeding would have been different). As our analysis of the prejudice prong of the cause and prejudice test shows, Correll cannot make the requisite showing that his sentence would have been different absent the *Gardner* error, if any.

[16] Because Correll has not shown sufficient cause for his failure to assert the *Gardner* claim in state court nor established actual prejudice, his claim does not warrant federal

habeas review. We affirm the district court's grant of summary judgment on this issue.

IV.

Correll's third claim of error centers upon testimony at trial that he had possessed marijuana at the time of his arrest. Correll argues that mentioning the marijuana severely compromised his misidentification defense, because Guy Snelling had testified that marijuana was stolen from his apartment on the night of the murders. Therefore, according to Correll, he suffered a violation of his due process rights.

The factual background of Correll's claim involves testimony by Butch Johnson, a Maricopa County detective, concerning property that the police had taken from Correll at the time of his arrest. On direct examination, Johnson testified that the property had included two ziplock plastic bags of marijuana. Correll's counsel immediately requested a sidebar conference, at which he moved for a mistrial. Judge Howe ultimately denied his motion, finding that Johnson's mention of marijuana had not prejudiced Correll.

[17] Evaluated against this factual backdrop, Correll's claim of due process violation is unavailing for two reasons. First, to the extent Johnson's testimony about Correll's possession of marijuana linked Correll to Snelling's mobile home, this evidence proved essential elements of the prosecution's case — namely, Correll's opportunity to commit the crimes charged and his identity as the true culprit. *See Estelle v. McGuire*, 502 U.S. 62, 68-70 (1991). As such, this evidence is admissible under Rule 404(b) of the Arizona Rules of Evidence, which regards "evidence of other crimes, wrongs, or acts" as admissible for purposes apart from proving a defendant's character, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Furthermore, even if the evidence of Correll's marijuana possession had no bearing on

any element of the prosecution's case against him, its admission did not create a due process violation by rendering his trial "fundamentally unfair." *See McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993). In contrast with the prosecution in *McKinney*, which engaged in extensive questioning, occupying over sixty transcript pages, regarding the defendant's fascination with knives and his commando lifestyle, the prosecution here elicited just one mention of Correll's marijuana possession, and that testimony was "relatively sterile," *id.* at 1385. In addition, the properly admitted evidence of Correll's guilt was substantial: the identification of an eyewitness; the boot prints that Correll had left at the crime scenes; his known use of the alias "Rick" and association with Nabors; and the phone call to Michael Correll that Terry Correll had placed at the direction of the police. Given this evidence, coupled with the brutality of the homicides, it was highly improbable that the error, if any, "had substantial and injurious effect or influence in determining the jury's verdict," *id.*, and decline to grant Correll's writ of habeas corpus on this ground.

V.

In his fourth and final claim of error, Correll attacks the Arizona Supreme Court's decision affirming his death sentence as violating his Eighth Amendment rights. Correll argues that the Arizona Supreme Court failed to cure the trial court's unconstitutional application of the death sentence, because it offered no principled explanation of the reweighing process it pursued after invalidating one of the aggravating factors supporting Correll's death sentence. Accordingly, Correll contends that his death sentence is invalid. We disagree.

A.

[18] Correll's claim is procedurally barred under the independent and adequate state ground doctrine, which prohibits federal habeas review "when a state court declined to address a prisoner's federal claims because the prisoner had failed to

meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). Such a prohibition applies here. In denying Correll's Rule 32 petition for post-conviction relief, the Arizona trial court found that Correll had raised no colorable issues relating to ineffective assistance of counsel, and ruled that Correll's remaining claims — including, presumably, his claim of Supreme Court Eighth Amendment violations — were precluded or waived, citing two Arizona statutes.[7] By invoking state-law procedural grounds for its dismissal of these latter claims, the state trial court barred later federal review of these claims on the merits. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). The unexplained order that the Arizona Supreme Court subsequently issued, denying review of the trial court's denial of Correll's motion for rehearing, is presumed to rest upon the same state-law procedural basis. *Id.* at 803 ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

[19] To overcome the resulting procedural default, Correll must establish cause for the default and actual prejudice as a result of the alleged violation of his Eighth Amendment rights. *See Pope*, 69 F.3d at 1026. Correll has failed to do so.

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[7]While one of the statutes Judge Howe cited has since been repealed, the other statute, Ariz. Rev. Stat. § 13-4232, continues in force, and reads in relevant part:

> A. A defendant is precluded from relief under this article based on any ground:
>
> 1. Still raisable on direct appeal or on a post-trial motion.
>
> 2. Finally adjudicated on the merits on appeal or in any previous collateral proceeding.
>
> 3. That was waived at trial, on appeal or in any previous collateral proceeding.

See Ariz. Rev. Stat. § 13-4232(A). Hence, this subsection continues to provide sufficient state procedural support for Judge Howe's ruling.

He has proffered no "objective factor external to the defense," *Murray*, 477 U.S. at 488, that prevented him or his attorney from filing a motion for reconsideration of the Arizona Supreme Court's decision, an avenue of relief that the Arizona Rules of Criminal Procedure clearly outline. *See* Ariz. R. Crim. P. 31.18(b) ("Any party desiring reconsideration of a decision of an appellate court may file a motion for reconsideration in the appellate court within fifteen days after the filing of a decision by the appellate court."). Nor can Correll demonstrate that the Arizona Supreme Court's reweighing analysis actually prejudiced him. While invalidating one of the aggravating factors supporting his death sentence, the Supreme Court affirmed the trial court's finding of three other aggravating factors, as well as the trial court's conclusion that no mitigating factors existed. Thus, even absent the invalid "other homicides" circumstance, the Supreme Court had ample grounds for affirming Correll's death sentence.

Correll argues that we may properly reach the merits of his Eighth Amendment claim because there is no independent and adequate state ground for Judge Howe's "generic and conclusory" ruling of preclusion and waiver. The independent and adequate state ground doctrine prohibits federal courts from addressing state prisoners' habeas claims when a state court has relied upon a state-law procedural default in declining to reach the merits of the federal claims. However, Correll misapprehends both the scope of this doctrine and Judge Howe's ruling. As we have previously noted, the presumption that no independent and adequate state-law basis exists for a state-court judgment "is to be applied only after it has been determined that the relevant state court decision fairly appears to rest primarily on federal law or is interwoven with federal law." *Thomas v. Lewis*, 945 F.2d 1119, 1122 (9th Cir. 1991). In the context of this determination, "[w]hether there is a plain statement from the state court is not the first or most significant inquiry." *Id.* There is no intimation in Judge Howe's order that he based his ruling of preclusion and waiver on federal grounds. On the contrary, his order states expressly, albeit

tersely, that this ruling arose from two provisions of Arizona statutory law. Nor can Correll claim that the subsequent repeal of one of the cited statutes, Ariz. Rev. Stat. § 13-4240, leaves Judge Howe's order without any state procedural support: the other statute Judge Howe cited, Ariz. Rev. Stat. § 13-4232, continues in force and provides a state-law basis for Judge Howe's finding of preclusion and waiver. Thus, we reject Correll's contention that this claim is not procedurally defaulted.

B.

[20] Even if we ignore Correll's procedural default, he cannot prevail on the merits of his Eighth Amendment claim. Characterizing the language the Arizona Supreme Court used in its reweighing analysis as "conclusory," Correll argues that the court violated his Eighth Amendment rights under *Jeffers v. Lewis*, 38 F.3d 411 (9th Cir. 1994), and *Stringer v. Black*, 503 U.S. 222 (1992). Contrary to Correll's contention, we find no constitutional error in the Arizona Supreme Court's approach.

[21] In a "weighing" state such as Arizona, when a trial court decides to impose a death sentence on the basis of both valid and invalid aggravating factors — as Judge Howe did here — a state appellate court can cure the error in either of two ways: "performing a harmless-error review, or reweighing the mitigating evidence against the remaining valid aggravating factors." *Jeffers*, 38 F.3d at 414. As Correll himself concedes, however, the United States Supreme Court "has never specified the degree of clarity with which a state appellate court must reweigh in order to cure an otherwise invalid death sentence," *id.* In other words, the Supreme Court has not translated its call in *Stringer* for "close appellate scrutiny of the import and effect of invalid aggravating factors," *Stringer*, 503 U.S. at 230, into a concrete set of requirements for a reweighing analysis that passes constitutional muster. Rather, the Court has merely noted that a state appellate court

may not simply authorize a death sentence as long as at least one valid aggravating circumstance remains, *see Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990).[8] Therefore, in the absence of clear guidelines from the United States Supreme Court, we measure the Arizona Supreme Court's reweighing analysis in the instant case against the analysis that we previously approved as constitutionally sound in *Jeffers*, armed with the presumption of this circuit that "state courts follow the law, even when they fail to so indicate," *Jeffers*, 38 F.3d at 415. Because we find that the two analyses are structurally and substantively identical, we reject Correll's claim of Eighth Amendment error.

[22] In addition to stating that it was independently reweighing the remaining valid aggravating factor against the mitigating circumstances, the Arizona Supreme Court "provided a principled explanation of what it did," pursuant to *Jeffers*. *See Jeffers*, 38 F.3d at 415. This "principled explanation" comprised the following elements: the acknowledgment of the obligation to undertake an independent review of the record to consider aggravating and mitigating circumstances, and to determine whether the latter outweighed the former; the analysis of the evidence before the trial court to evaluate the existence of aggravating and mitigating factors; the assessment of mitigating evidence, leading to the conclusion that there was no substantial evidence supporting mitigation; and the conclusion that careful review had found that the mitigating factors did not outweigh the mitigating circumstances. *Id.* Similarly, in *State v. Correll*, 715 P.2d 721 (Ariz.

[8]Correll urges us to follow Justice O'Connor's concurrence in *Sochor v. Florida*, 504 U.S. 527, 541 (1992), which declares that "[a]n appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." While we agree with this proposition, Correll's reliance on it is misplaced: by its own terms, Justice O'Connor's prescription was limited to harmless error analysis. In any event, as we discuss *infra*, the Arizona Supreme Court did offer a principled explanation of its decision affirming Correll's sentence.

Sup. Ct. 1986), the Arizona Supreme Court began its reweighing analysis by noting its duty to "independently review the record to determine the presence or absence of both aggravating and mitigating circumstances," *id.* at 731. The court then conducted a detailed evaluation of the evidence the trial court had considered to determine whether aggravating or mitigating circumstances existed. As a consequence, the court found that none of the mitigating factors Correll had proposed, whether considered alone or in combination, were "sufficiently substantial to call for leniency," *id.* at 734. After carefully assessing each potential mitigating factor, the court concluded: "We have found three aggravating circumstances of A.R.S. § 13-703(f)(2), (5), and (6). We have also considered the mitigating circumstances offered by defendant, and we conclude that even in combination the mitigating circumstances are not sufficiently substantial to call for leniency," *id.* at 735-36. Like the other facets of the *Correll* court's analysis, this conclusion is virtually indistinguishable from the conclusion that we approved in *Jeffers*: "We have carefully reviewed the record to determine whether the factors in mitigation outweigh the aggravating circumstances, and we find they do not." *State v. Jeffers*, 661 P.2d 1105, 1132-33 (Ariz. Sup. Ct. 1983). To attack the Arizona Supreme Court's analysis as unconstitutionally "conclusory," as does Correll, ignores established precedent. Hence, on both procedural and substantive grounds, we affirm the district court's dismissal of Correll's Eighth Amendment claim.

C.

[23] As a corollary to his main Eighth Amendment claim, Correll further asserts that the Supreme Court's reduction of one death sentence to a sentence of life imprisonment eviscerates the factual basis for the trial court's finding of aggravating factors. To the extent that this claim is subsumed in Correll's main Eighth Amendment claim, the former, like the latter, is procedurally defaulted, for the reasons that we have already articulated. To the extent that this claim lies outside

his main Eighth Amendment claim, Correll did not raise the former claim in his Rule 32 state post-conviction petition, thereby procedurally defaulting it essentially as he did his *Gardner* claim, *see supra* Part III.

[24] Nor are the merits of this claim strong. A state court's finding of aggravating circumstances is arbitrary and capricious in violation of the Eighth Amendment if and only if no rational factfinder could have reached the same conclusion. *See Lewis v. Jeffers*, 497 U.S. 764, 782-83 (1990). Correll's arguments notwithstanding, the Arizona Supreme Court's findings do not defy rationality here. Although the Arizona Supreme Court did find that Correll did not intend to cause Debra Rosen's death, this finding does not detract from its conclusions regarding aggravating factors. First, a rational factfinder certainly could have concluded that Correll was involved in the murders to eliminate witnesses to the robbery and with the expectation of pecuniary gain. This is sufficient to satisfy the *Lewis* standard, however reasonable Correll's alternative explanation of his motivation — to eliminate witnesses to the murder of Debra Rosen — may be.

[25] Second, Correll mischaracterizes the Arizona Supreme Court's determination that he committed the murders "in a cruel, heinous, and depraved manner" as resting largely on the strangling homicide of Rosen, which he did not intend. On the contrary, the court's assessment of this aggravating factor did not rely upon the uniquely painful and distressing features of Rosen's murder. Instead, the court emphasized the fear and apprehension that Snelling, Cady, and D'Brito must have experienced as they awaited their ultimate fate, as well as the depravity manifested in the senselessness of the murders, the helplessness of the victims, and Correll's cold-blooded disregard for human life. *See Correll*, 715 P.2d at 732-34. Quite apart from the *Lewis* standard, therefore, no invalid considerations underlay the Arizona Supreme Court's evaluation of the "cruel, heinous, and depraved" aggravating factor. Under *Lewis*, moreover, a rational factfinder could have reached the

same conclusion as the Arizona Supreme Court, based on the evidence of cruelty, heinousness, and depravity the court expressly considered. Thus, we decline to disturb the Arizona Supreme Court's decision affirming Correll's death sentence on this ground.

VI.

We reverse the district court's decision and remand to permit Correll to present his claim of ineffective assistance of counsel at sentencing at an evidentiary hearing. In all other respects, we affirm the district court's grant of summary judgment.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

APPENDIX B

[Court date stamp July 22, 1993]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MICHAEL EMERSON CORRELL, Petitioner, vs. SAMUEL LEWIS, et. al., Respondents,	No. CIV 87-1471-PHX-SMM ORDER

On September 15, 1987, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On September 18, 1987, the Court [1] stayed Petitioner's execution and on October 2, 1987, the Court appointed counsel. On February 24, 1988, Petitioner filed an amended petition.

On April 19, 1989, Respondents requested the Court to dismiss the amended petition for failure to exhaust state court remedies. On June 5, 1989, the Court conducted oral argument and denied Respondents' motion. On June 14, 1989, Respondents requested the Court to stay further proceedings in this matter pending resolution of the Ninth Circuit's decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988). [2] On July 21, 1989, the Court stayed proceedings on all issues relating to Petitioner's death sentence, but denied a stay with respect to all quilt phase issues.

On September 13, 1989, Respondents filed a motion for partial summary judgment. On February 12, 1990, Petitioner requested leave to amend his habeas petition to further clarify the basis for his claims. On March 14, 1990, the Court granted Petitioner's motion to amend the

1. This case was originally assigned to district court judge Charles L. Hardy.

2. The Ninth Circuit's decision in *Adamson* was later abrogated by *Walton v. Arizona*, 110 S.Ct. 3047 (1990).

petition. On April 2, 1990, Respondents filed another motion for summary judgment responding to the new allegations.

On July 13, 1990, this case was reassigned to Judge Stephen M. McNamee. On September 6, 1991, Respondents requested the Court to rule upon the merits of Petitioner's claims. On October 4, 1991, the Court held a status hearing in this matter. Upon agreement of the parties, the Court vacated the partial stay of proceedings and dismissed without prejudice all pending dispositive motions. In addition, the Court granted Petitioner leave to file an amended petition.

On December 6, 1991, Petitioner submitted his third amended petition for writ of habeas corpus. On February 19, 1992, Respondents filed a motion for summary judgment. On May 15, 1992, Petitioner filed his response to the State's motion for summary judgment and a motion to expand the record. On May 29, 1992, Respondents filed their reply.

Currently pending before the Court are Respondents' motion for summary judgment and Petitioner's motion to expand the record. Prior to discussing these motions, however, the Court wishes to resolve a procedural difficulty with Petitioner's amended petition and related pleadings. Specifically, Petitioner raises approximately (53) separate claims, designated under (27) separate paragraph numbers. Further, Petitioner infuses various sub-issues within many of these paragraphs which required both parties to consistently cross-reference various portions of their pleadings.

. . . .

II.) Motion to Expand the Record:

In conjunction with submitting his Response to the State's motion for summary judgment, Petitioner submitted a motion to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases. Although the Rule provides a federal habeas court with broad discretion, recent trends in habeas law have limited the practical application or scope of this Rule.

Petitioner requests the Court to expand the current record to include approximately (15) exhibits which constitute additional evidence in support of his claims. Petitioner further requests the Court to review each exhibit when determining the merits of his claims. In the alternative, Petitioner

asserts that the Court should consider the material as proof of adequate cause and actual prejudice to excuse any procedural default.

Respondents oppose any expansion of the record contending that the recent Supreme Court case of *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992), bars presentation or consideration of this "new" and previously unpresented material. Respondents assert that because Petitioner raised few facts in support of his allegations in prior state proceedings, he may not bypass those opportunities and present additional material in federal court absent a showing of cause and prejudice.

A review of the pleadings and record indicates that Mr. Correll wishes to buttress the evidentiary basis for claims involving challenges to the adequacy of his prior representation. Petitioner's request, therefore, raises issues of exhaustion and procedural default and specifically raises questions involving the extent to which a state prisoner must exhaust his claims in the state courts.

A) Exhaustion and Procedural Default:

As discussed previously, [13] state prisoners must present their claims to the state courts in a meaningful and fair manner, raising the operative facts and legal theories which they believe entitle them to relief. *Picard v. Connor*, 404 U.S. at 277-78, 92 S.Ct. at 509. Concerns for comity between the state and federal courts indicate that exhaustion means more than simply presenting bare allegations of a federal claim in state court. *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1720 (1992). Rather a state court must be given a fair opportunity to recognize a claim as potentially meritorious and based in fact.

For some time this Circuit has recognized the principle that evidence never before presented in the state courts may render a claim unexhausted and prevent federal habeas review. For example, in *Nevius v. Sumner*, 852 F.2d 463 (9th. Cir. 1988) the petitioner alleged that he was improperly denied an evidentiary hearing in state court post-conviction relief proceedings, or in the alternative in the district court, on his claim involving allegedly racial motives behind peremptory challenges to jurors. *Id* at 469.

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13. (footnote omitted)

After noting that Nevius did not present any new facts to precipitate an evidentiary hearing in either forum, the Court stated:

> The alleged remarks [of the prosecutor], however, are not part of any record in this case. They have not been presented to the state courts, either on appeal or during post-conviction proceedings. In habeas proceedings, the federal courts are not free to entertain new evidence that places the claim in a significantly different posture, when that evidence was never presented to the state courts.

Id. at 470 (citing, *Aiken v. Spaulding*, 841 F.2d 881, 883 (9th Cir. 1988) (dismissing petition for failure to exhaust when "new" evidence substantially improved the evidentiary basis of a claim)).

Thus, questions of exhaustion will arise any time evidence is offered in a federal habeas proceeding that was not previously presented to the state courts. A finding that a claim has not been properly presented to the state courts does not, however, guarantee a currently viable method of obtaining review in the state system. Rather, such findings implicate the principles of procedural default.

A review of recent authority indicates a trend toward greater deference to state courts and greater adherence to procedural rules. "Our procedural default jurisprudence and abuse of the writ jurisprudence help define this dimension of procedural regularity. Both doctrines impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones; both recognize the law's interest in finality; and both invoke equitable principles." *McCleskey v. Zant*, 111 S.Ct. 1454, 1469-70 (1991).

Beginning with *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Supreme Court commenced its trend of according great deference to state court determinations and procedures. In *Sykes*, the Court rejected the deliberate bypass standard to excuse a state prisoner's failure to comply with a state contemporaneous-objection rule and adopted the cause and prejudice standard. Subsequently in *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038 (1989) the Supreme Court determined that alternative holdings on both the merits and procedural grounds are not necessarily inconsistent, provided that the last state court rendering judgment on the

case "clearly and expressly"stated that its judgment rested upon state procedural grounds. *Harris v. Reed*, 489 U.S. at 263, 109 S.Ct. at 1043.

In recognition of the fact that multiple federal habeas challenges to the same conviction or sentence also jeopardize the finality of state court decisions, the Supreme Court reviewed federal standards for determining abuse of the writ. Upon review, the Supreme Court found that standardization of the law through application of the cause and prejudice test best served to enhance comity between the state and federal systems and discourage piece-meal litigation. *McCleskey v. Zant*, 111 S.Ct. 1454 (1991).

Electing to accord even greater deference to state procedures, the Supreme Court virtually eliminated the "plain statement" rule announced in *Harris*. Now a federal court must make a preliminary finding that there is good reason to question whether there is an independent and adequate state ground for the decision before the *Harris* presumption may be applied. *Coleman v. Thompson*, 111 S.Ct. 2546, 2559 (1991). Thus, if a state court opinion discusses no federal law and apparently bases its denial of relief on state procedural grounds, a federal court would have no reason to question the holding or apply the *Harris* presumption. *See Thomas v. Lewis*, 945 F.2d 1119, 1122 (9th Cir. 1991). In addition, the Supreme Court determined that unexplained summary denials by a state's highest court should not vitiate a prior finding of procedural default. Therefore, the Court found it appropriate to "look through" to the last state court judgment explaining the basis for denying relief and presume that later unexplained judgments adopted the same reasoning. *Ylst v. Nunnemaker*, 111 S.Ct. 2590, 2594 (1991).

Finally, extending the cause and prejudice principles developed in the abuse of the writ and procedural default cases, the Supreme Court applied the cause and prejudice test to decide whether to excuse a negligent failure to adequately develope facts in support of a claim during prior state court proceedings. *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992).

B.) Tamayo-Reyes:

In *Tamayo-Reyes*, the accused, an immigrant unable to speak or understand English, was charged with murder. After an attorney and an interpreter were provided, Tamayo-Reyes was advised by counsel to plead

nolo contendere to a charge of first degree manslaughter. After signing a plea form written in English, the Court through the interpreter, properly questioned Tamayo-Reyes and then accepted his plea.

After entry of judgment Tamayo-Reyes collaterally attacked his plea, alleging it was invalid because he did not knowingly and intelligently waive his rights or understand the nature of the plea agreement. Tamayo-Reyes based his contention upon his interpreter's alleged failure to properly translate the mens rea element of manslaughter, and further asserted that he thought he was agreeing to be tried on manslaughter charges.

The state court conducted a hearing on his claim, during which Tamayo-Reyes' counsel sought to prove the inadequate performance of his interpreter. Counsel, however, called no expert witnesses to assess the interpreter's performance and also failed to ask potentially relevant questions of the only witness called, Tamayo-Reyes. Instead, counsel relied primarily upon the interpreter's deposition and the answers that he viewed as indicative of inadequate performance. The State objected to this tactic, asserting that counsel was not a qualified interpreter. The state court sustained the objection and thus had little other evidence before it when it determined that the interpreter functioned adequately and denied relief.

After the federal district court denied a hearing and relief on his federal habeas petition, Tamayo-Reyes filed an appeal with the Ninth Circuit Court of Appeals. The Court of Appeals, applying § 2254 (d) and *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), found that Tamayo-Reyes was entitled to an evidentiary hearing in federal court. *Tamayo-Reyes v. Keeney*, 926 F.2d 1492 (9th Cir. 1991).

Upon application by the State, the Supreme Court granted certiorari to decide what standard should govern a habeas petitioner's failure to develop a material fact in state court proceedings. *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1717 (1992). Upon review the Supreme Court reversed the Court of Appeals and held that when a Petitioner fails to develop material facts in state court, he must demonstrate cause and prejudice for this failure before he is entitled to an evidentiary hearing in federal court. *Id.* at 1721.

In reaching its holding the Court noted that, "[i]n light of these decisions [*McCleskey, Coleman,* and *Sykes*], it is [ ] irrational to distinguish between failing to properly assert a federal claim in state court and failing in state

court to properly develop sucha claim." *Tamayo-Reyes*, 112 S.Ct. at 1719. Thus, a fair reading of *Tamayo-Reyes* discloses that the relevant inquiry is whether a petitioner had an *opportunity* to present his claims or evidence in state court.

C.) Arizona Post-Conviction Procedures:

In the instant case, Mr. Correll commenced his state collateral proceedings by filing a Rule 32 petition for post-conviction relief.[14] Pursuant to Rule 32.5 of the Arizona Rules of Criminal Procedure, Petitioner was required to raise all known evidence in support of his allegations when he filed his petition. Rule 32.5 provides, in pertinent part:

> Facts within [petitioner's] personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence, currently available . . . supporting the allegations of the petition shall be attached to it.

Rule 32.5 (a), Ariz.R.Crim.P. (emphasis added).[15]

The obvious prupose of Rule 32.5 is to consolidate the evidence and to provide for an orderly and thoughtful presentation of claims. If followed, this Rule ensures that a court is presented with material information supporting allegations of error, rather than broadly stated motions and requests for additional proceedings.

The Rule's importance becomes clear in light of the fact that a Rule 32 petition may be summarily dismissed if it fails to raise a "colorable claim" under state law. A "colorable" claim is raised if a petitioner raises allegations which, if accepted as true, would entitle him to relief. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986); *See also State v. Wagstaff*, 161 Ariz. at 71. However, a trial court is not required to hold evidentiary hearings based upon "mere generalizations and unsubstantiated claims." *State v. Borbon*, 146 Ariz. 392, 399 (1985).

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14. (footnote omitted)

15. The Arizona Rules of Criminal procedure were amended in September, 1992. However, the quoted language remains substantively unchanged from the rule in effect at the time of Petitioner's Rule 32 proceeding.

Thus, Mr. Correll was required to present more to the state courts than broad generalizations and unsubstantiated allegations. He was required to present some material information which, if accepted as true, would have sustained his burden of proving ineffective assistance of counsel.

D.) Mr. Correll's case:

There are currently (11) claims potentially effected by the request to expand the record. All of these claims raise challenges to the adequacy of Petitioner's prior representation.

To prevail on a claim of ineffective representation, a petitioner must demonstrate that counsel's performance fell outside the wide range of minimally competent representation and that, but for counsel's error, a reasonable probability exists that the result at trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A failure of Petitioner to sustain his burden with respect to either part results in a failure of the whole.[16]

Petitioner contends that he was inappropriately denied the opportunity to present his claims and evidence in the state courts. While the Court agrees with Petitioner that a state prisoner must be given a fair opportunity to present his claims and evidence, the Court finds unpersuasive his contention that he is entitled to a complete evidentiary hearing. Although Mr. Correll may not have received a state court evidentiary hearing, he did have the opportunity to justify the necessity of such proceedings and it is his own failure to do so that resulted in Judge Howe's summary denial.

A reading of the briefs in support of the Rule 32 petition discloses that Petitioner failed to set forth any information which would raise the bare allegations of ineffective assistance to the level of a "colorable claim" under state law. In fact, only four items were provided by Petitioner to substantiate his claims of ineffective assistance. Specifically, Petitioner provided the Rule 32 court with his own affidavit (Photostated Instruments, item 97; (Hereinafter "P.I."); An Affidavit of Susan Currey (P.I. item 100)

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16. For example, if Petitioner cannot demonstrate legitimate cause, further inquiry is unnecessary. *See Smith v. Murray*, 477 U.S. 527, 533, 106 S.Ct. 2661, 2666, 91 L.Ed.2d 434 (1986) (finding that failure to establish cause to overcome a state procedural default obviates the need to inquire into actual prejudice).

submitted by Rule 32 counsel in support of his motion for additional time to compile mental health records; Affidavits from Petitioner's Rule 32 counsel (P.I. items 104) indicating that all medical records from Gateways were destroyed in 1986 and nothing remains beyond the fact that Petitioner at one time received treatment; and a psychological evaluation from the California Dept. of Corrections, performed By one E.S. Birkman, which found Petitioner to have a severe immature personality disorder. (P.I. item no. 106).

Although some of this information related to claims of ineffective representation, it was not sufficient to present a "colorable" claim, primarily because Petitioner failed to provide any indication that he could satisfy both prongs of the *Strickland* test. Even if Petitioner's material provided a basis to question counsel's performance, Petitioner failed to provide any materials documenting what prejudice he suffered. *See e.g. State v. Borbon*, 146 Ariz. 392, 399 (1985) (Claims of ineffective assistance of counsel for not calling potential alibi witnesses found not colorable because petitioner failed to indicate the names of the alleged witnesses or relate the substance of their possible testimony); *See also State v. Gunter*, 132 Ariz. 64, 71 (Ariz. App. 1982) (Noting claim not colorable because petitioner failed to provide evidence showing the falsity of statements contained in a challenged presentence report).

The "new" exhibits at issue include affidavits from various legal and mental health experts; affidavits and letters from former attorneys who represented Petitioner at various stages of his appeal; the presentence report used in Petitioner's case; portions of transcripts from collateral matters; and various police reports compiled at the time of the crime. *See* Petitioner's Response to Motion for Summary Judgment, Exh. 1–15. However, little of this additional information is actually "new". The affidavits, police reports, and various transcripts were presumably available at the time of Petitioner's Rule 32 proceeding. Without some showing of what prevented their inclusion in the post–conviction petition, this Court cannot simply ignore Petitioner's omission.

"In habeas, equity recognizes that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. For these reasons, both the abuse of the writ doctrine and our procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey v.*

Zant, 111 S.Ct. at 1468. Similarly, a petitioner who by his own omission fails to provide a sufficient basis for further proceedings in the state system should not be allowed to obtain a more in depth review by presenting additional information withheld from the state courts. "It is hardly a good use of scarce judicial resources to duplicate fact-finding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings." *Tamayo-Reyes*, 112 S.Ct. at 1719-20.

The Court finds that Petitioner's motion to expand the record to include the various exhibits to be considered in support of the merits of Petitioner's claims must be denied absent a sufficient demonstration of legitimate cause and actual prejudice. However, the Court will retain and Petitioner may refer to any of the exhibits at issue solely for the purpose of establishing cause and prejudice or a fundamental miscarriage of justice. As in cases of state procedural default or federal abuse of the writ, application of the cause and prejudice test to excuse a state prisoner's failure to adequately present available evidence to the state courts accommodate concerns of finality, comity, and judicial economy.

To hold otherwise would weaken the principle of comity and render the fair presentation requirement ineffectual. An alternative holding would allow a petitioner to file broad and unsubstantiated claims in the state courts to avoid a procedural default and then expand their allegations upon federal habeas review without having presented the true substance of the claims in a meaningful fashion. That is exactly what the recent Supreme Court cases and Arizona Rule 32.5 seek to avoid.

APPENDIX C

[Court date stamp March 1, 1995]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MICHAEL EMERSON CORRELL,	)	
	)	No. CIV 87-1471-PHX-SMM
Petitioner,	)	
	)	
vs.	)	
	)	
SAMUEL LEWIS, et al.,	)	MEMORANDUM OF
	)	DECISION AND ORDER
Respondents,	)	

Pending before the Court is Respondents' motion for summary judgment to the third amended petition for writ of habeas corpus filed by Michael Emerson Correll [hereinafter Petitioner]. Also pending before the Court are Petitioner's motions for reconsideration and showing of cause and prejudice in support of claims found to be procedurally barred and in support of expansion of the record.

. . . .

A. Motion for Reconsideration

On July 22, 1993, the Court denied Petitioner's request to expand the record absent a showing of cause and prejudice extending the rationale of *Keeney v. Tamayo-Reyes*, __ U.S. ___, 112 S. Ct. 1715 (1992). Petitioner now moves the Court to reconsider its ruling based on the following three arguments: 1) the Court inappropriately extends the holding of *Tamayo-Reyes* to apply to an expansion of the record issue; 2) even if the Court's application is appropriate, it should not apply when the state court

failed to provide a full and fair hearing; and 3) the harsh result in this case is not supported by the holding of *Tamayo-Reyes*.

Although it is generally recognized that courts have the inherent power to revise its orders, *see*, 6A *Moore's Federal Practice* § 59.03, at 59-13 (1986), the exercise of that power is appropriate only under certain circumstances. There are no Ninth Circuit cases which adequately enumerate those circumstances in which a motion to reconsider should be granted. However, an Eastern District of Virginia case has articulated the relevant criteria for granting a motion to reconsider.

The court in *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99 (E.D. Va. 1983), ruled that motions seeking reconsideration of previous orders should be granted only where (1) "the court has patently misunderstood a party;" (2) the court "has made a decision outside the adversarial issues presented to the court;" (3) the court "has made error not of reasoning but of apprehension;" or (4) there is "a controlling significant change in the law or facts since the submission of the issue to the Court." *Id.* at 101.

Sound reasons underlie the bias against motions for reconsideration. When a motion for reconsideration is brought, the parties and the Court have already spent considerable time and resources addressing the issues. Unless the Court has made a gross error in reasoning, or there has been a significant change in the law or facts since the submission of the issue to the court, a court's prior decision should not be relitigated.

A review of Petitioner's Motion for Reconsideration indicates that he has advanced the same arguments and evidence previously raised. This does not satisfy the standard set forth in *Above the Belt*. However, in light of the special attention this Court gives to capital cases, the Court will discuss each of Petitioner's arguments.

In *Tamayo-Reyes*, the accused, an immigrant unable to speak or understand English, was charged with murder. After an attorney and an interpreter were provided, Tamayo-Reyes was advised by counsel to plead nolo contendere to a charge of first degree manslaughter. After signing a plea form written in English, the court through the interpreter, properly questioned Tamayo-Reyes and then accepted his plea.

After entry of judgment Tamayo-Reyes collaterally attacked his plea, alleging it was invalid because he did not knowingly and intelligently waive his rights or understand the nature of the plea agreement. Tamayo-Reyes based his contention upon his interpreter's alleged failure to properly translate the mens rea element of manslaughter, and further asserted that he thought he was agreeing to be tried on manslaughter charges.

The state court conducted a hearing on his claim, during which Tamayo-Reyes' counsel sought to prove the inadequate performance of his interpreter. Counsel, however, called no expert witnesses to assess the interpreter's performance and also failed to ask potentially relevant questions of the only witness called, Tamayo-Reyes. Instead, counsel relied primarily upon the interpreter's deposition and the answers that he viewed as indicative of inadequate performance. The State objected to this tactic, asserting that counsel was not a qualified interpreter. The state court sustained the objection and thus had little other evidence before it when it determined that the interpreter functioned adequately and denied relief.

After the federal district court denied a hearing and relief on his federal habeas petition, Tamayo-Reyes filed an appeal with the Ninth Circuit Court of Appeals. The Court of Appeals, applying § 2254 (d) and *Townsend v. Sain*, 372 U.S. 293 (1963), found that Tamayo-Reyes was entitled to an evidentiary hearing in federal court, pursuant to the fifth circumstance of *Townsend* (material facts were not adequately developed in a state court hearing). *Tamayo-Reyes v. Keeney*, 926 F.2d 1492 (9th Cir. 1991).

Upon application by the State, the Supreme Court granted certiorari to decide what standard should govern a habeas petitioner's failure to develop a material fact in state court proceedings. *Tamayo-Reyes*, 112 S. Ct. at 1717. Upon review the Supreme Court reversed the Court of Appeals and held that when a petitioner fails to develop material facts in state court, he must demonstrate cause and prejudice for this failure before he is entitled to an evidentiary hearing in federal court. *Id.* at 1721.

In reaching its holding the Court noted that, "[i]n light of these decisions [*McCleskey, Sykes*, and *Colemen*, which held that the cause and prejudice standard applicable to excuse state procedural defaults is equally applicable in abuse of the writ cases and to failure to object at trial and failure to raise a claim on appeal], it is . . . irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to

properly develop such a claim." *Tamayo-Reyes*, 112 S.Ct. at 1719. As a further rationale, the Court states, "As in cases of state procedural default, application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum." *Id.*

First, Petitioner contends that *Tamayo-Reyes* did not address Rule 7, Rules Governing Habeas Corpus Cases, and expansion of the record; therefore, the Court inappropriately extended the holding of *Tamayo-Reyes*. The Court disagrees that the holding of *Tamayo-Reyes* is not an appropriate analogy to resolve the issue of when a petitioner who has failed to develop adequately the record in state court should be allowed to expand the record in a federal habeas proceeding. Rather, the Supreme Court's rationale as discussed above and its desire to apply the cause-and-prejudice standard uniformly supports this Court's holding that a petitioner must show cause and prejudice to excuse his failure to develop adequately the facts during prior state court proceedings before a petitioner will be allowed to expand the record.

Further, since any "new" evidence introduced during an evidentiary hearing necessarily expands the record before the federal court, it is reasonable, likewise, to apply the cause-and-prejudice standard when Petitioner seeks to expand the record through affidavits and other documents. It would be improper to allow a petitioner to introduce through affidavits and other documents evidence that could not be introduced in an evidentiary hearing because a hearing is denied for failure to show cause and prejudice. Therefore, this Court has not inappropriately extended the reasoning of *Tamayo-Reyes* to apply to the issue of expansion of record. Petitioner's motion for reconsideration is denied on this ground.

Next Petitioner contends that, even if the Court's general application of *Tamayo-Reyes* is proper, factually this case is distinguishable because he was summarily denied a hearing in state court. Petitioner states, "*Tamayo-Reyes* analysis presupposes that the claimant has had an opportunity to create a complete record, at a full and fair hearing . . . . Unless a claimant has had a full hearing, he had no opportunity to develop his case at the state level." (Mot. Recons.: Expansion of R. at 3.)

The Court agrees that the relevant inquiry pursuant to *Tamayo-Reyes* is whether a claimant has had the *opportunity* to present his claims or evidence in state court. However, the Court disagrees with Petitioner that a hearing is necessary before a claimant has that opportunity. Petitioner fails to recognize that he must present a colorable claim to the state court before the court must even consider the appropriateness of granting Petitioner an evidentiary hearing.

Pursuant to Rule 32.5 of the Arizona Rules of Criminal Procedure, Petitioner was required to raise all known evidence in support of his allegations when he filed his petition. Rule 32.5 provides, in pertinent part:

> Facts within [petitioner's] personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence currently available . . . supporting the allegations of the petition shall be attached to it.

Ariz. R. Crim. P. 32.5(a) (emphasis added).[5]

This rule is important since a Rule 32 petition may be summarily dismissed if it fails to state a colorable claim under state law. If Petitioner fails to state a colorable claim no evidentiary hearing is required. *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (evidentiary hearing not required for "mere generalizations and unsubstantiated claims").

On January 28, 1986, the Arizona Supreme Court issued its opinion affirming the conviction and two of the three death sentences. Petitioner, filed his petition for post-conviction relief on January 27, 1987. (Ex. H, Mot. to Dismiss.) On April 10, 1987, and on April 14, 1987, Petitioner filed his first and second supplements to the Rule 32 petition. (Ex. H, Mot. to Dismiss.) Petitioner then filed three additional supplements to his Rule 32 petition which were not authorized and arguably not considered by the trial court.[6] (Pet. Min. E. at 35.) On May 15, 1987, the state court

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5. The Arizona Rules of Criminal Procedure were amended in September, 1992. However, the quoted language remains substantively unchanged from the rule in effect at the time of Petitioner's Rule 32 proceeding.

6. It is not entirely clear to the Court whether supplements two through five were considered by the trial court, and Respondents have not addressed this issue. This Court's review of the

(continued...)

dismissed Petitioner's Rule 32 petition and found no colorable claims of ineffective assistance of counsel were raised. (Ex. J, Mot. to Dismiss.) Petitioner now asks this Court to review the state court's determination that Petitioner failed to present colorable claims of ineffective assistance of counsel.

Whether a petitioner has presented adequate allegations of ineffective assistance of counsel to establish a colorable claim to warrant an evidentiary hearing and prevent a summary dismissal pursuant to Rule 32, Arizona Rules of Civil Procedure, is a matter of state law. As such it is improper for a federal habeas court to re-examine state court determinations on state law questions unless the alleged error rises to the level of a due process violation. *Estelle v. McGuire*, 502 U.S. 62, __, 112 S. Ct. 475, 480 (1991). The Court finds that the state court's ruling that Petitioner failed to present a colorable claim of ineffective assistance of counsel does not constitute a due process violation.[7]

Petitioner had an *opportunity* to present a colorable claim, but failed to do so. Petitioner was allowed to supplement his petition for post-conviction relief on two, and possibly on five occasions. The information contained in the supplements and in the exhibits Petitioner now wishes this Court to consider was available to Petitioner at the time he filed his Rule 32 petition. As the Supreme Court stated in *Tamayo-Reyes*, "[i]t is hardly a good use of scarce judicial resources to duplicate fact-finding in federal court merely because a petitioner has negligently failed to take advantage of opportunities

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(...continued)

trial court's minute entries and Respondent's Motion for Clarification and Motion for Accelerated Hearing reveals that on April 21, 1987, the trial court found the "[f]iling of other supplemental pleadings [after the second supplement] were neither requested nor authorized." (Petition for Review Minute Entries [hereinafter Pet. Min. E.] at 35; Photostated Instruments [hereinafter P.I.] at 94.) However, the State, in its response to the post-conviction relief petition, responded to supplements two through four. (P.I. at 98.) In the trial court's order denying Petitioner post-conviction relief, the court listed those documents it reviewed in ruling on the petition. However, the trial court only mentioned that it reviewed the first supplement. In any event, this Court finds that the supplements do not, in actuality, add sufficient evidence to raise a colorable claim of ineffective assistance of counsel since the supplements do not provide evidence of prejudice.

7. If Petitioner is arguing that there was error in the post-conviction review process itself, then this claim is not addressable through habeas corpus proceedings. *Franzen v. Brikman*, 877 F.2d 26 (9th Cir. 1989), *cert. denied*, 493 U.S. 1012 (1989).

in state-court proceedings." 112 S. Ct. at 1719. Thus, the Court will not reverse its ruling on the motion to expand the record based on this argument.

Finally, Petitioner argues that the Court's ruling creates a harsh result that is not supported by *Tamayo-Reyes* because the Court's ruling "would restrict Mr. Correll to proving the merits of his claims in federal court, with the material submitted to establish a colorable claim in state court." (Mot. for Recons.: Expans. of R. at 5.) Petitioner argues that Tamayo-Reyes at least had a record of a hearing from which to argue in federal court. Again Petitioner fails to acknowledge that it was his own failure to establish a colorable claim that prevented him from being entitled to a hearing in state court. Rule 32.5, Arizona Rules of Civil Procedure, required Petitioner to raise all known evidence in support of his allegations when he filed his petition. Petitioner's failure which effectively denied the state court the opportunity to decide the ineffective assistance of counsel claims created precisely the situation the Supreme Court in *Tamayo-Reyes* was attempting to eradicate.

In summary, based on the above discussion, the Court upholds its ruling of July 22, 1993. Petitioner must show legitimate cause and actual prejudice to excuse his failure to present the evidence contained in the exhibits to the state court before this Court will allow an expansion of the record.

B. Cause and Prejudice Analysis

Petitioner contends that the actions of the state court in denying him a hearing, access to an investigator and mental health expert, and additional time constitutes sufficient "cause" to excuse his failure to present the evidence in state court.

"Cause" is a legitimate excuse for the default and ordinarily turns on whether a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

The Court finds that the state court's actions do not constitute objective factors external to the defense.[8] Petitioner was denied a hearing because he failed to establish colorable claims of ineffective assistance of counsel or because his claims were procedurally barred. [9] The state court denied Petitioner's motions for appointment of an investigator and a mental health expert because Petitioner failed to show what evidence the investigator and expert were expected to produce, that the evidence was unavailable to trial counsel, and that the evidence could have changed the verdict or sentence.[10] (Ex. J., Mot. to Dismiss.) Regarding the denial of requests for an extension of time, the state court did grant a motion for additional time to file a supplemental petition and, in fact, doubled the requested time to sixty days. (Pet. Min. E. at 32.)

Additionally, the Court finds that either the exhibits themselves were in existence before the Petitioner's Rule 32 proceeding or Petitioner could have obtained the information contained in the exhibits Petitioner wishes this Court to consider before his Rule 32 proceeding. The transcripts and police investigation records, Exhibits 3, 7, 8, 12, and 15, were clearly in existence and could have been obtained by Petitioner before trial. Exhibit 14, letter dated September 16, 1985, was in existence prior to Petitioner's Rule 32

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8. The Court noes that to the extend that Petitioner has filed to present the allegations of the State thwarting his efforts to develop fully his claims to the state court, this Ccurt may not consider the allegations as cause. To the extent that Petitioner is arguing that a defect in the Rule 32 process constitutes cause, the Court finds that this claim is not cognizable in a federal habeas proceeding. *Franzen v. Brinkman*, 877 F.2d at 26. Nevertheless, the Court finds that the allegations of State impediment is not, in actuality, actions external to the defense and, therefore, do not constitute sufficient cause.

9. To the extent that Petitioner is arguing that ineffective assistance of Rule 32 counsel is cause, courts have held that a petitioner has no Sixth Amendment right to counsel in a Rule 32 proceeding. Therefore ineffective assistance of Rule 32 counsel cannot constitute cause. *Coleman v. Thompson*, 501 U.S. 722 (1991); *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993).

10. Petitioner argues that the state court's finding that the "mental health materials Petitioner describes in his present pleadings were dated and superseded by contemporaneous Rule 11 proceedings" reflects an improper conclusion that the Rule 11 pre-screening precluded all consideration of Petitioner's mental condition. This Court disagrees with Petitioner's interpretation of the above-quoted language. As stated above the trial court denied Petitioner's motion for an investigator and an expert because Petitioner did not show the evidence was unavailable to trial counsel. The reference to the mental health materials was merely an example of evidence available to Petitioner at the time of trial.

proceeding. Finally, the information contained in the remaining exhibits was not "new" evidence and could have been developed prior to Petitioner's Rule 32 proceeding. That Petitioner contends he produced some of the affidavits in response to the Rule 32 ruling is not relevant. Rather, the issue is whether the information contained in the affidavits was available or could be obtained, but was not because of some factor external to the defense. Therefore, Petitioner has failed to demonstrate cause for failing to present this evidence to the state court.

Given the Court's ruling that Petitioner has failed to show cause, the Court need not determine whether Petitioner has adequately shown prejudice. *See Smith v. Murray*, 477 U.S. 527, 533 (1986) (finding that failure to establish cause to overcome a state procedural default obviates the need to inquire into actual prejudice). Nevertheless, the Court has reviewed Petitioner's argument and finds that Petitioner has failed to demonstrate that he was denied fundamental fairness. To establish prejudice in the procedural default context, a petitioner must show "not merely that the errors at trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting the entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). Petitioner attempts to establish prejudice by arguing the importance of each exhibit to his habeas claims. Applying a similarly stringent showing of prejudice as set forth in *Frady*, Petitioner must show more than that the evidence would be helpful to his habeas claims. This Petitioner has not done. Rather, Petitioner must show that he would win on the merits of the claims.

In summary, the Court finds that Petitioner has failed to establish legitimate cause and actual prejudice to excuse his failure to present the evidence contained in Exhibits 1 through 10 and 12 through 15 to the state court. This Court will not consider those exhibits when deciding the merits of Petitioner's ineffective assistance of counsel claims.

APPENDIX D

[Attachment A to Petition for Post-Conviction Relief dated January 27, 1987.]

[Preliminary Explanation: This petition is being filed by petitioner with assistance of counsel who has limited familiarity with this case and its record and under severe time constraints resulting from the one-year deadline for filing a Rule 32 petition for post-conviction relief pursuant to A.R.S. § 13–4232. Petitioner is not presently represented by counsel and urges this Court to appoint him counsel and to permit appointed counsel to amend this petition and set forth petitioner's claims and the basis therefor at the earliest possible date.]

1. Petitioner received ineffective assistance of counsel at his trial in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Petitioner's trial counsel failed to investigate sufficiently petitioner's mental state at the time of the offense and to request court appointment of a mental health expert to examine petitioner to determine whether petitioner could have premeditated the crime despite Petitioner's documented history of severe mental problems. Petitioner's trial counsel failed to investigate petitioner's history of substance abuse or chemical dependency or the effects of substantive abuse at the time of the crime on petitioner's intent to commit the crime despite evidence that petitioner was a drug addict. Trial counsel failed to present expert testimony on the effect of alcohol and drugs on a drug addict despite evidence that petitioner was under the influence of alcohol and drugs at the time of the offense. Trial counsel failed to adequately investigate the facts of the offense. Trial counsel failed to object to the court's removal for cause of a juror who expressed doubts concerning the death penalty notwithstanding that Arizona juries do not make sentencing decisions in capital cases. Trial counsel failed to object to the ex parte verbal communication between the Court and the court appointed psychiatrist who examined petitioner to determine whether a Rule 11 examination was necessary. Defense counsel failed to present evidence demonstrating the need for the Rule 11 examination despite the court's request for such evidence and petitioner's history of severe mental problems including hospitalization for mental illness. Trial counsel failed to request an instruction on the effect of intoxication on the required culpable mental state for first degree murder despite evidence that petitioner was under the influence of alcohol and drugs at the time of the crime. Trial

counsel failed to present evidence that petitioner was under the influence of alcohol and drugs at the time he made a statement to Terry Correll. Trial counsel failed to acquire and compile all of petitioner's medical records including those records of his former commitment to mental hospitals in his youth. Trial counsel also failed to investigate and present testimony of family members and other witnesses familiar with petitioner's prior history of physical, mental and emotional illness and substance abuse. Trial counsel improperly communicated to the trial court that petitioner had allegedly confessed to another client of the public defender's office despite the fact that the judge would sentence petitioner if petitioner were convicted.

2. Petitioner received ineffective assistance of counsel at the Sentencing Phase in violation of his rights under the Fifth, Sixth and Fourteenth Amendments. Trial counsel failed to adequately investigate and present mitigating testimony at sentencing despite the fact that petitioner has family members and other persons familiar with petitioner's chaotic, abusive and disruptive upbringing, his commitment to mental institutions in his youth, his severe head injuries, his history of substance abuse or his chemical dependency. Trial counsel did not interview Petitioner or properly direct investigation after trial and before the aggravation/mitigation hearing. Counsel did not interview the probation officer who authorized the presentencing report submitted to the court before the hearing. Counsel did not conduct any investigation with respect to the contents of the sentencing report. Although counsel told the court at sentencing that he had given the probation officer names of witnesses who wished to make a statement on petitioner's behalf, counsel failed to call those witnesses to testify at the sentencing hearing. No witnesses were called and no evidence presented on petitioner's behalf. Counsel failed to call petitioner as a witness in the aggravation/mitigation hearing in order to elicit such mitigating circumstances as petitioner's physically and mentally abused upbringing, his commitment to mental hospitals, his numerous severe head injuries, his prolonged substance abuse and his mental and emotional problems. Counsel failed to request court appointment of an expert to examine petitioner regarding his mental and emotional problems which would have constituted mitigating circumstances. Counsel presented no expert testimony on the effect of substance abuse or chemical dependency on petitioner's intent to commit the crime despite evidence of a history of substance abuse and petitioner's ingestion of alcohol and drugs prior to the crime. Counsel failed to present any evidence at sentencing as to whether a death sentence in

petitioner's case would be excessive when compared to sentences imposed for similar crimes and for similar offenders.

3. The trial court's refusal to instruct the jury on second degree murder violated petitioner's right to a reliable assessment by a jury of whether he was guilty of a capital crime under the Fifth, Sixth, Eighth and Fourteenth Amendments. Evidence in the record indicated that petitioner had consumed alcohol and drugs shortly before the crime. This evidence could support a finding that the murder was committed without premeditation. Despite this evidence, the trial court denied counsel's request that the jury be instructed on second degree murder.

4. The trial court's failure to instruct the jury on the voluntariness of petitioner's statement admitted at trial violated petitioner's Fifth, Sixth and Fourteenth Amendments. Although trial counsel's pretrial motion to suppress was denied by the trial court, the petitioner had a right to have a jury determination on the voluntariness of his statements and have the jury instructed that the State has the burden to prove beyond a reasonable doubt the voluntariness of petitioner's statements.

5. The court's instruction to the jury that it could convict the petitioner of first degree murder if it found the killing was premeditated or committed during the commission of a felony with no requirement of unanimous agreement violated petitioner's right to a unanimous jury verdict and proof beyond a reasonable doubt of the charges against him in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Following the court's instruction to the jury on both premeditated murder and felony murder, the jury received only two forms of verdict on the three first degree charges: guilty or not guilty. The verdict of guilty returned by the jury did not differentiate between the two types of first degree murder. It is impossible to tell from the verdict if the jury unanimously found petitioner guilty of premeditated murder or felony murder. The jury may not have been able to reach a unanimous verdict on either charge had it been properly instructed and forced to render an unambiguous verdict. Petitioner's indictment for premeditated murder or alternatively felony-murder failed to give him adequate notice of the charges against him and to properly prepare his defense and due process of law and the right to effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments.

6. The trial judge's denial of petitioner's motion for new counsel violated his rights under the Fifth, Sixth and Fourteenth Amendments. Despite petitioner's uncontroverted statements that he could not effectively communicate with his court-appointed attorney, the trial court, without further inquiry, summarily denied petitioner's motion.

7. The trial court improperly questioned prospective jurors for their views on capital punishment in violation of petitioner's right to an impartial jury under the Sixth and Fourteenth Amendments. The court removed a juror for cause who expressed doubts as to the death penalty. Because Arizona juries do not make sentencing decisions in capital cases, the juror's removal served no legitimate purpose and improperly biased and prejudiced the jury.

8. The trial court failed to recuse itself at petitioner's sentencing phase despite trial counsel's request to do so based on the court's improper review of the presentence report. The consideration of hearsay in the presentence report violated defendant's right to confrontation and reliability in capital sentencing guaranteed by the Sixth, Eighth and Fourteenth Amendments.

9. The trial court's order that petitioner submit to an interview by a probation officer prior to sentencing without any advice to the petitioner of his right to remain silent or refuse to be interviewed for that purpose and the subsequent consideration of the information obtained in that interview in imposing the death sentence in this case violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

10. The trial court's consideration of prior convictions of the petitioner which were not shown to be constitutionally valid violated A.R.S. § 13-703(F)(2) and the Eighth and Fourteenth Amendments. Petitioner's death sentence was based on aggravating findings derived from alleged prior convictions of robbery in California. The prosecution produced no evidence at the sentencing hearing that petitioner's prior convictions of robbery were obtained in a constitutionally valid manner. No rational finder of fact could find beyond a reasonable doubt from the evidence adduced at trial that petitioner's prior convictions were constitutionally valid.

11. Petitioner was denied the right to a jury trial on the presence or absence of aggravating factors in violation of his rights under the Sixth and Fourteenth Amendments. Arizona's method for determining death sentences

requires the prosecution to prove, as a predicate to consideration of the death sentence, specific, legislatively-defined aggravating facts going beyond the elements proved at the guilt phase, and to prove those facts beyond a reasonable doubt. Petitioner was found eligible for the death penalty on the basis of findings by the trial court that the offense was "heinous, cruel or depraved", that the offense was committed for pecuniary gain, that petitioner was previously convicted of a felony involving the use or threat of violence on another person and that petitioner was convicted of more than one homicide committed during the commission of the offense. As defined by Arizona law, these findings involved a determination of the facts and circumstances of the crime indistinguishable from the kind of facts that must be proved during the guilt/innocence phase of criminal trials. The determination of the presence or absence of aggravating factors is a separate issue from and a prerequisite to the determination of the adequacy of mitigation and the appropriate sentence to be imposed.

12. The Arizona Supreme Court's failure to give notice to petitioner's appellate counsel as to what class of cases it might compare petitioner's case resulted in appellate counsel's failure to effectively represent petitioner in the proportionality review of his case and denied petitioner his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments. Although the Arizona Supreme Court conducted a proportionality review of petitioner's death sentence, as it is required to do, neither the Arizona capital sentencing statute nor the Arizona Supreme Court specifies what class of cases it might compare petitioner's to in order to assess the comparative proportionality of petitioner's death sentence. Petitioner's trial and appellate counsel were, therefore, unable to render petitioner effective assistance at sentencing and on appeal. The Arizona Supreme Court could not have systematically compared petitioner's death sentence for proportionality to the sentences imposed in like cases because it did not have before it any regularized and reliable source of information about other potentially similar cases to identify cases similar to petitioner's in order to compare the sentences typically handed out in such cases to the one handed out in petitioner's case. The court's failure to properly conduct a proportionality review of petitioner's case prejudiced petitioner and violated his right to due process under the Fifth and Fourteenth Amendments.

13. The discriminatory application of the Arizona death penalty violates petitioner's rights under the Eighth Amendment and the Equal Protection and Due Process clauses of the Fourteenth Amendment. The Arizona death

penalty is applied in a manner which discriminates against poor defendants, young defendants and male defendants whose victims are Caucasian. Arizona's death row is populated by impoverished males. Petitioner is a young, improverished [sic] male. The victims of the crime for which he was condemned were Caucasians. The probability of execution in Arizona and in the United States is overwhelmingly greater in cases where the victim is Caucasian and the defendant is poor and male, irrespective of the seriousness of the crime and the prior record and character of the defendant. No woman has been sentenced to death under the present sentencing law although approximately ten percent of potentially capital homicides in the State of Arizona are committed by women. There is nothing regarding the nature of the crime, the aggravating and mitigating factors that could explain this pattern other than discrimination on the basis of sex. Petitioner's death sentence was imposed pursuant to this pattern and practice. Defendant has been sentenced to die, at least in part, because of his sex and economic status and the race of his alleged victims.

14. The death penalty has been imposed in an arbitrary and irrational fashion by Arizona courts. Petitioner's death sentence was imposed arbitrarily when compared with other cases involving either a sentence of death or a sentence of life imprisonment. There is no rational, constitutionally permissible basis for distinguishing petitioner's case, or the few cases in which the death penalty has been imposed in Arizona and in the United States, from the many cases in which it has not been imposed. The pattern of imposition of the death penalty in Arizona and in the United States shows that prosecutors, jurors and courts have made decisions to seek or to impose the death penalty on the basis of factors other than the strength and seriousness of the case, factors that are wholly irrelevant to a constitutional purpose of criminal punishment. The decision to seek and impose petitioner's death sentence was influenced by such considerations. The aribitrary [sic] application of the death penalty in petitioner's case amounts to cruel and unusual punishment in violation of the Eighth Amendment and violates petitioner's right to due process under the Fifth and Fourteenth Amendments.

15. The death sentence as actually imposed in the State of Arizona, in the United States and in this case, actually serves no purpose of deterrence or retribution and constitutes the purposeless infliction of pain and suffering unjustified by any valid state interest, in violation of the Eighth and Fourteenth Amendments. No person has been executed in the State of

Arizona since 1964, although hundreds of persons have been convicted of murder since that time for which the death penalty was legally available. A small number of persons have been involuntarily executed in the United States since 1967, though thousands of persons have been convicted of murders for which the death penalty was legally available since that time. No deterrent purpose could possibly be served by the execution of the sentence of death with such infrequency and the infrequency of such executions demonstrates it is unnecessary as a retributive device. The actions of prosecutors, jurors, governors and courts, in preventing the actual execution of the sentence of death with any regularity inthe [sic] State of Arizona and in the United States, demonstrate the actual execution of the sentence of death is inconsistent with societal standards of decency. Executions set socially sanctioned examples of, and provide an inducement to, violence, and thus do not serve any legitimate state purpose in decreasing the number of homicides. There is no penal purpose served by executions which is not more effectively and more efficiently served by life imprisonment.

16. In Arizona, after a conviction for first degree murder, the State prosecutor decides, in his or her sole and unfettered discretion, whether to seek the death penalty. The standardless discretion given to the Arizona prosecutor as to whether to seek death at the sentencing phase of a trial violates the Eighth and Fourteenth Amendments.

17. In petitioner's case, the accumulation of errors and irregularities that occurred at petitioner's trial, sentencing and appeal rises to the level of a denial of fundamental fairness. When a number of errors none of which alone necessarily rises to a denial of due process, accumulate to deprive an individual of his right to a fair trial and a fair sentencing, the tainted result must be reversed.

18. Petitioner's appellate counsel failed to raise trial counsel's ineffective assistance at trial and at sentencing as an issue on appeal. The allegations set forth in ¶¶ 1 and 2 are incorporated here by reference. Because petitioner was represented by a member of the Maricopa County Public Defender's Office on appeal, appellate counsel had a direct conflict of interest in raising the issue of ineffective assistance of counsel at trial and at sentencing. Appellate counsel also failed to present any evidence on appeal as to whether a death sentence in petitioner's case would be excessive

when compared to sentences imposed for similar crimes and for similar offenders.

19. The Arizona Supreme Court affirmed petitioner's sentence even though it held that the aggravating circumstance set forth in A.R.S. § 13–703(F)(8) did not apply. By affirming petitioner's death sentence on a basis different from the findings of the trial court as to which aggravating facts applied, petitioner was denied due process of law under the Sixth, Eighth and Fourteenth Amendment rights. The sentencing judge's finding that petitioner committed the crime in expectation of the receipt of something of pecuniary value violates the Eighth and Fourteenth Amendments. Because the court instructed the jury on both premeditated and felony murder and the jury verdict did not distinguish on which theory, if any, the jury based its verdict, petitioner's conviction for first degree murder could be based on the jury's finding of felony murder. Any defendant found guilty of felony murder based on an underlying felony robbery cannot avoid the finding of pecuniary gain as an aggravating circumstance in the penalty trial. This finding by the judge, however, repeats an element of the underlying crime of felony murder and fails to constitutionally narrow those cases which the death penalty is imposed from those in which it is not.

APPENDIX E

JOHN M. ANTIEAU
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Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	No. CR-141125
Plaintiff-Respondent,	FIRST SUPPLEMENT TO PETITION FOR POST-CONVICTION RELIEF
vs.	
MICHAEL EMERSON CORRELL,	
Defendant-Petitioner.	REQUEST FOR EVIDENTIARY HEARING
	REQUEST FOR APPOINTMENT OF EXPERT
	REQUEST FOR INFORMAL CONFERENCE
	(Judge Howe)

Petitioner has stated a colorable claim of ineffective assistance of counsel for failure to gather and present evidence of Petitioner's mental impairment and/or substance abuse, in the following contexts:

1. a Rule 11 motion

2. a voluntariness hearing
3. as trial evidence
4. an intoxication instruction
5. a Rule 26.5 motion
6. as mitigation at sentencing.

Petitioner requests an evidentiary hearing on this subject. Petitioner further requests, pursuant to A.R.S. § 13–4013(B), that the Court appoint, and order reasonable compensation for, a mental health expert to examine Petitioner and collect full and accurate information concerning Petitioner's mental impairment and/or substance abuse, for the purpose of assisting in a determination of whether Petitioner was prejudiced by the inaction of defense counsel as alleged above. Petitioner nominates Dr. Otto L. Bendheim, M.D., 5051 North 34th Street, Phoenix, Arizona.

If the foregoing matter cannot be resolved by pleadings, Petitioner requests an informal conference on the subject.

DATED this 10 day of April, 1987.

s/_____
JOHN M. ANTIEAU
Attorney for Petitioner

Copy of the foregoing
mailed/delivered this 10
day of April, 1987, to:

The Honorable Joseph D. Howe
Judge of the Superior Court
101 West Jefferson
Phoenix, Arizona 85003

William J. Schafer, III
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Michael Emerson Correll
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s/ JMA

APPENDIX F

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Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	)	NO. CR-141125
	)	
Plaintiff-Respondent,	)	SECOND SUPPLEMENT
	)	TO PETITION FOR POST-
vs.	)	CONVICTION RELIEF
	)	
MICHAEL EMERSON CORRELL,	)	(Judge Howe)
	)	
Defendant-Petitioner.	)	
	)	

1. Petitioner was denied effective assistance of counsel in gathering and presenting evidence of Petitioner's mental impairment and/or substance abuse. The matter was mentioned briefly at the time of sentencing, but no testimony or documentation was offered. On appeal, the Arizona Supreme Court had this to say on the subject:

> Third, Defendant claims that his psychological problems prevented him from understanding the wrongfulness of his conduct. According to Defendant, he received psychological therapy as a teenager for emotional depression, explosive anger, and violent behavior. Other than these statements Defendant has offered no evidence or expert testimony on which we could base a finding that he was unable to appreciate the wrongfulness of his conduct. Uncorroborated, these statements do not present sufficient evidence to indicate his capacity was impaired.

State v. Correll, 148 Ariz. 468, 482, 715 P.2d 721, 735 (1986). The Court, in effect, invited an evidentiary hearing to remedy what, on appeal, was a deficient record. Petitioner renews his request for such an evidentiary hearing and his request for appointment of an expert witness to assist in preparation for that hearing.

2. Petitioner was denied effective assistance of counsel at senttencing [sic]. The record reflects that the jury returned its verdicts on October 23, 1984, at which time sentencing was set for November 23, 1984. The record further reflects that sentencing proceeded on that first scheduled date, and without the presentation of any mitigating evidence. Petitioner alleges that in the one month that elapsed between verdicts and sentencing there was no communication between himself and his trial attorney and consequently no preparation for the presentation of any mitigating evidence. Under those circumstances, counsel's role was that of a "neutral observer" and Petitioner was denied effective assistance of counsel. State v. Carriger, 132 Ariz. 301, 645 P.2d 816 (1982); State v. Perkins, 141 Ariz. 278, 686 P.2d 1248 (1984). Prejudice is presumed. State v. Nash, 143 Ariz. 392, 694 P.2d 222 (1985). Petitioner is entitled to a resentencing with the effective assistance of counsel.

3. Petitioner was denied effective assistance of counsel on the motion for change of counsel. On October 5, 1984, Petitioner filed a written motion to dismiss his attorney of record, deputy public defender Stephen R. Collins. On October 12, at an informal conference, Collins himself moved to withdraw, informing the Court that another client of the public defender reported that Petitioner confessed. After a brief discussion, the Court denied Collins' motion, simply because that other client was not going to be called as a witness in Petitioner's trial. It is unclear whether Petitioner was present at that informal conference. The transcript indicates that he was, while the minute entry indicates that he was not. In any event, the relation between Petitioner and Collins was, for the purpose of their respective, [sic] motions, was adverse, and Petitioner was not represented by any other attorney for the limited purpose of those motions. Collins, the only attorney Petitioner had at that moment, presented to the court information which was extremely prejudicial to Petitioner and contrary to his interests. Petitioner submits that he was thereby denied effective assistance of counsel at a critical stage of the proceedings, in violation of the guarantees of the United States and Arizona Constitutions.

DATED this 14 day of April, 1987.

s/_____
JOHN M. ANTIEAU
Attorney for Petitioner

Copy of the foregoing
delivered this 14
day of April, 1987, to:

The Honorable Joseph D. Howe
Judge of the Superior Court
101 West Jefferson
Phoenix, Arizona 85003

Vicki Gotkin Adler
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
and mailed to
Michael Emerson Correll
P.O. Box B-51493
Florence, Arizona 85232

APPENDIX G

JOHN M. ANTIEAU
Attorney At Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 254-2894

Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	)	NO. CR-141125
	)	
Plaintiff-Respondent,	)	AFFIDAVIT
	)	
vs.	)	(Assigned to Judge Howe)
	)	
MICHAEL EMERSON CORRELL,	)	
	)	
Defendant-Petitioner.	)	
	)	

Petitioner, through counsel, submits the attached affidavit in support of his petition for post-conviction relief and the fourth supplement thereto.

DATED this 21st day of April, 1987.

s/_____
JOHN M. ANTIEAU
Attorney for Petitioner

Copy of the foregoing
mailed/delivered this 21st
day of April, 1987, to:

The Honorable Joseph D. Howe
Judge of the Superior Court
101 West Jefferson
Phoenix, Arizona 85003
s/JMA

Vickie [sic] Gotkin Adler
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

AFFIDAVIT

MICHAEL EMERSON , being duly sworn, states:

1. I am the defendant who was sentenced to death in Maricopa County CR-141125 and the Petitioner herein.

2. Prior to my trial, both I and my attorney, deputy public defender Stephen R. Collins, anticipated the death penalty if I were convicted. The county attorney had never offered any plea agreement for any lesser sentence.

3. On October 23, 1984, after the verdicts were returned, I talked with my attorney for about 5 minutes, and he briefly advised me what would happen at sentencing. He advised me that the death penalty had been sought and would probably be imposed.

4. During the month between the verdicts (October 23) and the sentencing (November 23), I had no face-to-face meeting with my attorney and little or no communication of any kind. I was incarcerated in the Main Jail in Phoenix, but my attorney never visited me there during that month.

5. About the end of October, I was visited for about ½ hour by the probation officer who was preparing the presentence report. I had no further contact with that probation officer. After that meeting, I called my attorney to request a copy of the presentence report. I don't remember whether I actually talked to my attorney on that day, but, in any event, I did not receive a copy of the presentence report until the day of sentencing.

6. I had no other communication of any kind with my attorney during the month before sentencing. We never discussed any pre-sentence hearing, or the possibility of presenting witnesses and evidence, or the possibility of continuing sentencing in order to better gather and present witnesses and evidence.

7. At the time of sentencing, my attorney asked me whether I wanted to say anything to the judge. This was the first time he had advised me I had a right to make a statement. I declined to make any statement solely because I maintained that I was innocent of the charges. My attorney never advised me about the wisdom of this position, nor of any alternatives. He

did not advise me that, even though I maintained my innocence, I could or should present some evidence in my own behalf.

8. As sentencing began, my understanding was that the procedure was limited to statements by the prosecutor, my attorney, and myself. I thought that documents could be presented to the judge by my attorney, but I did not realize that other persons could make statements or testify in my behalf.

9. The statement my attorney made at sentencing was based on his general knowledge of me from the time he had represented me. I [sic] was not a statement that we had discussed or prepared specifically for sentencing.

FURTHER AFFIANT SAYETH NOT.

s/_____
MICHAEL EMERSON CORRELL

SUBSCRIBED AND SWORN TO before me this 20th day of April, 1987.

s/_____ 1/23/89
Notary Public

APPENDIX H

JOHN M. ANTIEAU
Attorney At Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 254-2894

Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	)	No. CR-141125
	)	
Plaintiff-Respondent,	)	MOTION FOR EXTENSION OF TIME
	)	
vs.	)	and
	)	
MICHAEL EMERSON CORRELL,	)	THIRD MOTION FOR STAY OF EXECUTION
	)	
Defendant-Petitioner.	)	
	)	(Assigned to Judge Howe)
	)	

Petitioner, through undersigned counsel, moves the Court to extend for one month, until June 8, 1987, the time for filing a reply in support of his petition for post-conviction relief. Petitioner has alleged that he did not receive effective assistance of counsel at trial when defense counsel failed to present, in various contexts including sentencing, full information about Petitioner's background and especially his psychological history.

In the last month, undersigned counsel has communicated with increasing frequency, with Petitioner, the attorney who helped Petitioner prepare his petition, and various California institutions, in attempts to gather the information referred to above.

Gateways Hospital and Mental Health Center in Los Angeles has indicated that it has records about Petitioner from 1974-75 (i.e., the

"psychological therapy" Petitioner's previous statements about which the Arizona Supreme Court found "uncorroborated") but that the release provided by Petitioner is not adequate and a more specific one is required. Petitioner is preparing a release which will meet the Gateways requirements. But Gateways has also indicated that it will then take two weeks to locate the records and retrieve them from storage, and then the records will not be released without the approval of Petitioner's former treating physician(s), who may or may not be still affiliated with Gateway, or who may or may not be readily locatable at all.

In addition, records have been requested from the California Youth Authority and the California Department of Corrections, but have not yet been received.

Petitioner therefore requests some additional time in which to gather these records and present then [sic] to the Court in support of the claims stated in his petition.

In light of the foregoing, Petitioner again moves the Court to enter an order staying execution of Petitioner presently set for June 10, 1987. Petitioner has filed a non-frivolous petition and is therefore entitled to a say [sic] of execution pursuant to Rule 32.4(d), Arizona Rules of Criminal Procedure.

DATED this 1 day of May, 1987.

s/_____
JOHN M. ANTIEAU
Attorney for Petitioner

Copy of the foregoing
mailed/delivered this 1
day of May, 1987, to:

The Honorable Joseph D. Howe
Judge of the Superior Court
101 West Jefferson
Phoenix, Arizona 85003

Vicki Gotkin Adler
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

And a Copy Mailed to:

Michael Emerson Correll
P.O. Box B-51493
Florence, Arizona 85232

s/JMA

APPENDIX I

JOHN M. ANTIEAU
Attorney At Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 254-2894

Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	)	No. CR-141125
	)	
Plaintiff-Respondent,	)	AFFIDAVIT IN SUPPORT
	)	OF MOTION FOR
vs.	)	EXTENSION OF TIME
	)	
MICHAEL EMERSON CORRELL,	)	(Judge Howe)
	)	
Defendant-Petitioner.	)	
	)	
	)	

Petitioner, through undersigned counsel, submits the attached affidavit in support of his motion for an extension of time in which to file the reply in support of his petition for post-conviction relief. The affidavit indicates that Petitioner does have a history of mental disorders and that there should be records which should be presented to, and considered by, the Court.

DATED this 4th day of May, 1987.

s/_____
JOHN M. ANTIEAU
Attorney for Petitioner

Copy of the foregoing
mailed/delivered this 4th

day of May, 1987, to:

The Honorable Joseph D. Howe
Judge of the Superior Court
101 West Jefferson
Phoenix, Arizona 85003

Vicki Gotkin Adler
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

Michael Emerson Correll
P.O. Box B-51493
Florence, Arizona 85232

s/ JMA

AFFIDAVIT

SUSAN P. CURRY, being duly sworn, states:

1. I have been a probation officer for San Luis Obispo County, California since 1980. I am currently a juvenile probation officer. I have never supervised Michael Correll in this professional capacity, but I have known him, and maintained regular contact with him, since 1976.

2. I met Michael Correll in 1976 at El Paso de Robles School, a facility of the California Youth Authority in Paso Robles where my husband Robert D. Curry was (and remains) the Protestant chaplain, and where I was also a regular participant in religious and counseling programs.

3. Michael Correll had been committed to the Youth Authority by the Juvenile Court of Los Angeles County. My impression of him at that time was of a person suffering extreme emotional pain, and who had abused drugs for some years attempting to cope with that pain and resulting dysfunction.

4. I learned that Michael Correll had previously been committed by the Juvenile Court of Los Angeles County to Gateways Hospital and Mental Health Center. I know Gateways to be a mental hospital, and one that is frequently used for juvenile psychiatric placement. Though I do not know the details of Michael's diagnoses or treatment at Gateways, I do know that some proportion of the placements there are related to drug abuse.

5. In November, 1978, Michael Correll was discharged from the Youth Authority and committed to the California Department of Correction. I maintained contact with him through this period.

6. The Superior Court in Sacramento County ordered Michael Correll to the correctional facility at Vacaville for a 90-day diagnostic evaluation. The California Medical Facility at Vacaville is a psychiatric corrections facility which serves several purposes. First, it houses inmates with severe psychiatric disorders. Second, it conducts mental health evaluations, when requested, of persons entering the Department of Corrections or likely to do so. It is in this second role that the Vacaville facility temporarily had custody of Michael Correll.

7. I know that every inmate committed to the Vacaville facility has a mental health evaluation, and the Department of Corrections almost certainly has records of the 1978 evaluation of Michael Correll. I do not know the contents of that report.

FURTHER AFFIANT SAYETH NOT.

s/_____
SUSAN P. CURRY

SUBSCRIBED AND SWORN TO before me this 4th day of May, 1987.

s/_____
Notary Public

APPENDIX J

JOHN M. ANTIEAU
Attorney At Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 254-2894

Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	No. CR-141125
Plaintiff-Respondent,	MOTION FOR APPOINTMENT OF
vs.	INVESTIGATOR
MICHAEL EMERSON CORRELL,	THIRD MOTION FOR EXTENSION OF TIME
Defendant-Petitioner.	FIFTH MOTION FOR STAY OF EXECUTION
	(Judge Howe)

Petitioner, through undersigned counsel, moves the Court, pursuant to A.R.S. § 14-4031(B) [sic], to appoint, and order compensation for, an investigator to assist Petitioner and counsel in locating persons and records in support of his petition for post-conviction relief.

Petitioner has claimed that there was/is evidence which could have and should have been presented in mitigation, but was not presented. That evidence includes evidence of Petitioner's history of mental disorders, and specifically evidence concerning his commitment to, and treatment at, Gateways Hospital and Mental Health Center in Los Angeles, California in 1974-1975. Petitioner has previously requested adequate time to obtain

records from Gateways and present them to the Court. Petitioner, through counsel, has written and called Gateways several times and has sent releases in an effort to obtain those records.

Undersigned counsel was informed today by Ms. Frances Hanish, Custodian of Medical Records at Gateways, that her search for records about Petitioner has revealed that Petitioner's file was destroyed in 1986, i.e., after Petitioner was sentenced and before this petition was filed. Thus, it appears impossible, at this time, to determine whether or not Petitioner was prejudiced by defense counsel's failure to provide this evidence in mitigation.

It further appears necessary to locate and interview Petitioner's (1974-1975) treating physician(s) in order to determine the nature and duration of Petitioner's mental disorder and the nature and effect of any treatment. Petitioner requests the Court to extend for at least 60 days the time he can accomplish these tasks and present records, affidavits, and/or testimony to the Court.

In light of the above, Petitioner again moves the Court to enter an order staying execution of Petitioner presently set for June 10, 1987.

DATED this 7th day of May, 1987.

s/_____
JOHN M. ANTIEAU
Attorney for Petitioner

AFFIDAVIT

JOHN M. ANTIEAU, being duly sworn, states:

1. I am the attorney representing Michael Emerson Correll in connection with his petition for post-conviction relief.

2. I have been informed by Stephen R. Collins, the attorney who represented Petitioner at trial and sentencing, that he (Collins) did not, and

does not, have any records of Petitioners' mental disorders and treatment therefor from Gateways Hospital and Mental Health Center in Los Angeles or any other institution. No such records were presented to the trial court at the time of trial and sentencing.

3. I have been attempting to obtain those records directly from Gateways. On May 7, 1987, I was informed by Ms. Frances Hanish, Custodian of Medical Records at Gateways, that Petitioner's file was destroyed in 1986, and that all that remains is a record that Petitioner was, in fact, a patient at Gateways.

FURTHER AFFIANT SAYETH NOT.

s/_____
JOHN M. ANTIEAU

SUBSCRIBED AND SWORN TO before me this 7th day of May, 1987.

s/_____
Notary Public

Copy of the foregoing
mailed/delivered this
7th day of May, 1987, to:

The Honorable Joseph D. Howe
Judge of the Superior Court
101 West Jefferson
Phoenix, Arizona 85003

Vicki Gotkin Adler
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

Michael Emerson Correll
P.O. Box B-51493
Florence, Arizona 85232

s/JMA

BEST AVAILABLE COPY

APPENDIX K

JOHN M. ANTIEAU
Attorney At Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 254-2894

Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	)	No. CR-141125
	)	
Plaintiff-Respondent,	)	FIFTH SUPPLEMENT TO
	)	PETITION FOR POST-
vs.	)	CONVICTION RELIEF
	)	
MICHAEL EMERSON CORRELL,	)	
	)	(Judge Howe)
Defendant-Petitioner.	)	
	)	

Petitioner submits the attached report of a psychological examination, done in 1978 by the California Department of Corrections, in support of his petition for post-conviction relief, request for an evidentiary hearing, and request for appointment of an expert and an investigator.

DATED this 18th day of May, 1987.

s/_____
JOHN M. ANTIEAU
Attorney for Petitioner

Copy of the foregoing
mailed/delivered this 18th
day of May, 1987, to:

The Honorable Joseph D. Howe
Judge of the Superior Court
101 West Jefferson
Phoenix, Arizona 85003

Vicki Gotkin Adler
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

Mailed to:

Michael Emerson Correll
P.O. Box B-51493
Florence, Arizona 85232

s/JMA

MICHAEL W. YOURD 7-31-85

CASE SUMMARY

PARENTS:	Age	Occupation	Address
Father: Jay Emerson Correll	50	Unk. Window tinting	7940 Ross Weed Sac., Ca.
Mother: Joyce Correll	37	Real Estate	" "

S/Mo-S/Pa:

SIBLINGS:

1.	Subject	18	Unemployed	Fair Oaks w/friends
2.	Tim Correll	21	Unk.	Unk.
3.	Terry Correll	17	CYA Parole	Unk.
4.	Danny Carroll	14	Boys Ranch	
5.	Robin Correll	13	Foster home	
6.	Patty Correll	7		w/parents
7.				

MARRIAGES	Age	Place	Date	Outcome
1. None				
2.				

Not legalized

1. Several

2.

CHILDREN	Age	Support	Residing
1. None			
2.			
3.			
4.			

FAMILY ARREST RECORD:

(E) Bro. Danny-burg, robb (C/P, I.O); Bro. Terry-Robb. ADW, CTA; Bro. Tim-co. jail burg.

RESIDENTIAL PATTERN:

(K) Born and raised in L.A.

RELIGION: Subject: Christian Spouse: N/A Parents: Jehovah Wit.

EDUCATION: Age Left School: 14 Claimed Grade: 8

Measured Grade: 9.2 Verified: No. Intelligence Level: Average

JOBS:	Firm:	Address:	Title:	From/To:	Verified:
1.	Harrah's Club	Tahoe	Maintenance	1978-1 wk	No
2.	Floyd Owens Landscaping	Fair Oaks, Ca.	Landscaping	1978-1 mo	No

3.

DISABILITY: None UNION: None

S.S. No: Unk. OCCUPATION: (H) General Labor

FINANCIAL: No assets/no debts

MILITARY: Service Branch: NONE Rank: Verified: Serial No.

Date Entered: Date Discharge: Type Discharge:

Disciplinary: Duties: Disability: TIME IN STATE BEFORE COMM. OFFENSE: Life Age 1st Arrest: 12 Age 1st Comm: 14 OFFENSE AND INST. OF 1ST COMMITMENT: Gateways Mental Institution=beyond parental control ESCAPE HISTORY: 1976-CYA-w/o force, County Farm 1975 w/force, many other juvenile *12/79 DOI*

DELINQUENCY HISTORY:

(G) Runaway

ALCOHOL: (F) Moderate - not related to offense

NARCOTICS & DRUGS:

	Addict	User	Suspect	1st Used	Rate
Heroin	XX	__	_____	1974(14)	denies recent
Marijuana	__	XX	_____	10	_____
Other Opiate (type)	__	__	_____	_____	_____
Other Dangerous (type)	AMPHETAMINES			12	_____

None: EXPERIMENTAL WITH ALL AVAILABLE

COMMENTS: (A) No (C) 0 (I) Many

PSYCHOLOGICAL EVALUATION

Correll is an 18-year-old Caucasian received at NRC-CMF on 9/8/78 following his conviction for the offenses of Robbery With Use of Firearm, Two Counts and Robbery, One Count. Correll is being evaluated pursuant to Section 1203.03 of the Penal Code.

At the time of the commission of his current offense, Correll was on active parole from the California Youth Authority as YA14123.

Correll considers himself to be in good physical health and denies suffering any disabilities or vocational limitations. He is currently not receiving any type of medication.

Correll has a lengthy mental health history dating from his early teen years commencing in 1974 with a three month commitment to Gateway Mental Hospital in Los Angeles and again in 1975 when he was committed for eight days at Gateway Mental Hospital. According to Correll he absconded from the hospital on both occasions. Correll was involved in psychotherapy during his three months at Gateway and while he was a ward of the California Youth Authority. According to Correll, he did receive a concussion at age seven, but suffered no residual effects. He has never suffered from convulsive seizures. According to Correll he does experience severe depression and has on one occasion made a suicide gesture by ingesting numerous pills. Correll's depression is obviously of an anaclitic type and is generated by infantile fears of abandonment. Correll admits to a social use of alcohol but denies a drinking problem. He admits to having used most drugs including heroin, cocaine, barbiturates [sic], amphetamines, strong hallucinogenics, and marijuana. While Correll states that he has never been physically addicted to any drug, he does consider that he has had a drug problem. Correll feels that he has psychological problems for which he needs treatment. He stated "I must learn to deal with my anger."

Correll is of at least normal intelligence and no severe defects of language or learning were noted. During the interview he was correctly oriented, in good reality contact, and free of manifest psychotic symptoms. His memory is intact for both recent and past events. His thought processes were within normal limits and his associations were relevant. Correll's psychological orientation is narcissistic and his his [sic] ego is poorly differentiated. His level of ego functioning is best described as childish. His ego boundaries are vaguely defined, fragile and easily collapsed under conditions of emotional stress or fears of rejection. He is defensive utilizing primarily displacement and magical forms of thinking. His ego controls evidence weak internalization and he is primarily impulse dominated. His acting out potential is estimated to be high particularly in the ereas [sic] of self-destructive, violent and regressive behaviors. The purpose of most of his acting out behavior appears to be attention seeking. Correll's thinking is unconsciously shaped by severe needs for infantile physical and emotional dependency. He seems [sic] himself as being of little value and in need of emotional support. His emotional and psychosexual development is retarded and his emotional responses while appropriate, are rather shallow. His motivation is within normal limits, he does possess some intellectual insight into his psychological needs and

motivations, and has a fair capacity for increased insight. Correll has positive identifications but they are not of great strength.

Correll claims vocational skills, however, he has been in the community so rarely and for such a short period of time during the last several years, that he has had no opportunity to utilize his training. His work habits are weak and inconsistent. Correll's social orientation is best described as dyssocial. Correll has a few survival skills suitable for competitive society and is definitely in need of psychotherapeutic intervention. He stated that he much preferred to return to adult corrections rather than to the Youth Authority as he felt that he would benefit more from the experience. He expressed a strong desire to become involved in a psychotherapy program. Correll does appear to require the strong environmental controls found within the Department of Corrections where he may hopefully become involved in a meaningful psychotherapy program.

DIAGNOSTIC IMPRESSION: (301.89) Immature personality (severe) with symptomatic acting out.

This evaluation is not considered confidential.

9/20/78

E. S. Birkman,
Staff Psychologist

CORRELL B-96749-Z NRC-CMP 10/13/78 ca

RECOMMITTED AS B-98785 11/21/78 df 9

APPENDIX L

MARICOPA COUNTY

Clerk of the Court

February 16, 1996 HON. J. D. HOWE D. Jamison
Deputy

No. CR 141125

FILED: FEB 21 1996
County Attorney
By: Gerald R. Grant

STATE OF ARIZONA

v.

MICHAEL EMERSON CORRELL Gail Natale

Michael Emerson Correll #51493
ASPC
P.O. Box 8600
Florence, AZ 85232

On April 19, 1995, defendant filed a Notice of Post Conviction Relief - his second since his convictions were affirmed by the Arizona Supreme Court January 28, 1986, of three counts of first degree murder, one count of attempted first degree murder, four counts of kidnapping, one count of armed robbery and one count of burglary[1] and following denial of his first petition for post-conviction relief 5/14/87.

May 1,1995, Presiding Criminal Judge Reinstein appointed Attorney Gail G. Natale counsel for defendant. On May 25 that counsel filed a blanket request for preparation of the entire Superior Court record. On June 12, the judge of this division informally inquired of counsel if a record was truly needed, in view of the preceding appeal and PCR petition, and advised that no ruling would be made on the motion absent further request from counsel. (ME, June 12, 1995). July 20, 1995, counsel

---

1. Supreme Court No. 6437, Jan. 28, 1986. The Supreme Court reduced the death sentence on Count 1, first degree murder, to life imprisonment. Slip op. 36.

MARICOPA COUNTY

Clerk of the Court

February 16, 1996 HON. J. D. HOWE D. Jamison
Deputy

No. CR 141125

STATE v. CORRELL Continued

requested her own copies because her client was using others in federal proceedings. The request was denied August 16, 1995, the court noting that all records were available at the Arizona Supreme Court, November 17, 1995, defendant moved to extend PCR filing time 120 days from Nov. 20, 1995. Coincidentally, the same day, this court dismissed the PCR "for want of activity." November 25, defendant moved to vacate the dismissal, which as granted, the court setting a new deadline of January 17, 1996.

January 10, 1996, a new lawyer associated on the defense, Martin Lieberman, P.C. That same day, defendant filed a motion to change judge for cause. The next day, January 11, 1996, defendant filed another motion for time extension suggesting ruling by another judge because of the previous day's motion for change of judge. The state responded to both motions on January 22, 1996.

Associate Presiding Criminal Judge Ryan denied the motion for change of judge by order of February 5,1996.

The motion for time extension is ripe for ruling. The court has reviewed it and finds it states no cause and that the state's response is well-taken.

IT IS ORDERED the Motion to Extend Time for Filing the Petition for Post-Conviction Relief is DENIED.

IT IS FURTHER ORDERED, pursuant to the state's response, the Petition for Post-Conviction Relief is DISMISSED.

(2)

Supreme Court, U.S.
FILED
OCT 8 1998
OFFICE OF THE CLERK

No. 98-222

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

TERRY L. STEWART, et al.,
PETITIONERS,

-vs-

MICHAEL EMERSON CORRELL,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONERS

10 pp

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Michael Correll's three first-degree murder convictions and two death sentences were affirmed by the Arizona Supreme Court. In his state post-conviction relief petition, Correll alleged that his attorney at sentencing was constitutionally deficient for not presenting additional mitigating evidence. Correll failed to allege any additional evidence not presented at the time of sentencing, and his post-conviction relief attorney conceded that he could not prove prejudice under *Strickland v. Washington*. Based on the record before him, the state trial judge denied the petition as failing to state a colorable claim.

Correll filed a petition for writ of habeas corpus raising, inter alia, a claim of ineffective assistance of counsel at sentencing. Correll moved to supplement his petition to include affidavits and other evidence never alleged or presented to the state courts in support of his ineffectiveness claim. The district court concluded that this new evidence could not be considered based on this Court's holding in *Keeney v. Tamayo-Reyes*, and denied Correll's request for an evidentiary hearing. The Ninth Circuit reversed, finding that there was no "evidence exhaustion" requirement under *Keeney* and that Correll was entitled to an evidentiary hearing on his claim. The court also found that the state court's failure to hold an evidentiary hearing would constitute cause for Correll's procedural default if one existed. These holdings are inconsistent with the opinions of other circuit courts and raise the following questions:

1. May a state inmate receive a federal evidentiary hearing on a claim of ineffective assistance of counsel and present evidence never alleged as the basis for the claim in state court?

2. Is the state court's determination that there is no colorable claim of prejudice "cause" for the failure to develop the evidence in state court?

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REASON WHY THE WRIT SHOULD ISSUE 1

AFTER THE DRAFTING AND FILING OF THE PETITION FOR CERTIORARI, THE NINTH CIRCUIT SPECIFICALLY RECOGNIZED THAT THE VARIOUS CIRCUIT COURTS OF APPEAL HAVE A DIVERGENCE OF OPINION CONCERNING THE CORRECT INTERPRETATION OF *KEENEY v. TAMAYO-REYES*. 1

THE ISSUE BEFORE THE NINTH CIRCUIT COURT WAS WHETHER THE DISTRICT COURT ERRED BY REFUSING TO EXPAND THE HABEAS RECORD BY HOLDING AN EVIDENTIARY HEARING WHEREIN CORRELL COULD PRESENT HIS NEW EVIDENCE. IN RULING ON THAT ISSUE, THE NINTH CIRCUIT HELD THAT A COLORABLE CLAIM WAS PRESENTED TO THE STATE COURT, AND THEREFORE THE NEW EVIDENCE—NEVER OFFERED IN STATE COURT—COULD BE CONSIDERED. THIS HOLDING IS PROPERLY CHALLENGED IN THIS COURT. 3

CORRELL'S ATTEMPT TO JUSTIFY THE NINTH CIRCUIT'S OPINION ON THE BASIS THAT *TAMAYO-REYES* HAD A STATE-COURT EVIDENTIARY HEARING, AND HE DID NOT, IS WITHOUT MERIT AS RECOGNIZED BY THE NINTH CIRCUIT IN THIS CASE. 5

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REASON WHY THE WRIT SHOULD ISSUE

AFTER THE DRAFTING AND FILING OF THE PETITION FOR CERTIORARI, THE NINTH CIRCUIT SPECIFICALLY RECOGNIZED THAT THE VARIOUS CIRCUIT COURTS OF APPEAL HAVE A DIVERGENCE OF OPINION CONCERNING THE CORRECT INTERPRETATION OF *KEENEY v. TAMAYO-REYES*.

Before addressing the arguments submitted by Correll, it must be noted that after the drafting of the State's Certiorari Petition, the Ninth Circuit recognized that there is a conflict among the circuit courts regarding the interpretation and application of *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992). *See Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998). In the instant case, the Ninth Circuit found that there was no "evidence exhaustion" requirement and attempted to distinguish those cases from other circuits. (Appendix to Petition for Certiorari at 1992 n.3.) However, in *Seidel*, the Ninth Circuit retreated from the position that these cases can be distinguished and found that *Tamayo-Reyes* did not affect "the district court's broad authority to consider **any evidence** relevant to a federal habeas petitioner's claim." 146 F. 3d at 754 (emphasis added). As authority for this interpretation of *Tamayo-Reyes*, the Court cited to Justice O'Connor's dissent in *Tamayo-Reyes* and their own opinion in *Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994). *Id.* The Ninth Circuit specifically recognized that their opinion was inconsistent with decisions from the Eleventh and Sixth Circuits. *Id.* (*See Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997), and *Mathis v. Zant*, 975 F.2d 1493 (11th Cir. 1992)). The court claimed that their opinion was consistent with cases from the Second and Eighth Circuits. *Id.* (*See Pagan v. Keane*, 984 F.2d 61, 63–65 (2d Cir. 1993), and *Clemmons v. Delo*, 124 F.3d 944, 951–52 (8th Cir. 1997)). Petitioners maintain that Ninth Circuit is wrong in concluding that these opinions from the other circuits support their conclusion that there is no evidence exhaustion.

In *Clemmons v. Delo*, the Eighth Circuit was faced with a situation where a material witness was not disclosed by the state—creating a *Brady* claim. In state court, the inmate had submitted a memorandum concerning what the witness would have said had he been called at trial; the witness did not testify at the state post-conviction relief proceeding. In federal court, the witness did testify before the district court. On appeal, the state maintained that the failure to call the witness at the state post-conviction proceeding was

a procedural default. The Eighth Circuit disagreed. The Eighth Circuit reaffirmed, however, its position that the states must be presented with critical facts if a prisoner is to avoid a procedural default. The Eighth Circuit's analysis of what a petitioner must do to exhaust his claim is consistent with the State's position in this case, and the district court's analysis below.

> In *Bolder*, petitioner argued in his state postconviction proceeding that his trial counsel was ineffective for failing "to interview or call character witnesses and inmate witnesses" for use as mitigation evidence in petitioner's capital sentencing proceeding. . . . This Court held that this claim was procedurally barred, not because of his failure actually to call the mitigation witnesses at his 27.26 proceeding, but because petitioner completely "failed to allege what mitigating evidence would have been discovered had [his lawyer at trial] conducted a reasonable investigation into his background." . . . The problem was not just that Bolder had failed to call the witnesses; he also neglected to allege what they would have said and thus failed to provide the 29.15 court with the particulars of his ineffective assistance of counsel claim. In contrast, Clemmons introduced Clark's statement, which, as we have already said, is admissible in 29.15 proceedings to show what Clark's testimony would have been at trial. Missouri law did not obligate Clemmons to do any more than he did to provide the 29.15 court with the factual basis for his claim. Clemmons was, therefore, not barred from presenting the substance of Clark's testimony to the District Court.

Clemmons v. Delo, 124 F.3d at 949 (citations omitted). The court emphasized again later in their opinion that a state petitioner was required to exhaust the factual basis of the claim. 124 F.3d at 951 n.5. Contrary to the Ninth Circuit opinion, *Clemmons* does not support the theory that once a claim is raised in state court, federal courts have the discretion to consider "any" evidence that would relate to his federal claim. *Seidel v. Merkle*, 146 F.3d at 754.

In *Pagan v. Keane*, the Second Circuit held that after *Tamayo-Reyes*, district courts continued to have the inherit authority to hold evidentiary hearings when "the material facts were not adequately developed at the State court hearing." 984 F.2d at 63 (citing 28 U.S.C. § 2254(d)(3)). *Pagan* does not discuss, however, whether the disputed evidence was presented in state

court. After *Pagan*, the Second Circuit was faced with a challenge concerning the failure to present material facts to the state court. In *Jones v. Vacco*, 126 F.3d 408, 413 (2d Cir. 1997), the Court recognized that to exhaust a claim, both the facts and law must be presented to the state court:

> The exhaustion doctrine is satisfied if the claim has been "fairly presented" to the state courts. *See Dorsey*, 112 F.3d at 52 (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971)). A claim has been "fairly presented" if the state courts are apprised of "both the factual and the legal premises of the claim [the petitioner] asserts in federal court."... The state courts will not have a fair opportunity to review the claim if material factual allegations have been omitted.

Id. Again, the Second Circuit's opinions would not support the Ninth Circuit's conclusion that the district court's discretion would allow the presentation of any evidence regardless whether such evidence was presented in state court. The Ninth Circuit's ruling in this case is not supported by any compelling authority. Moreover, to the extent the Eighth and Second Circuit Court opinions discussed above are deemed to be consistent with the Ninth Circuit's ruling, this Court should grant the petition to rectify the supposed inter-Circuit conflict and clarify the exhaustion requirement.

THE ISSUE BEFORE THE NINTH CIRCUIT COURT WAS WHETHER THE DISTRICT COURT ERRED BY REFUSING TO EXPAND THE HABEAS RECORD BY HOLDING AN EVIDENTIARY HEARING WHEREIN CORRELL COULD PRESENT HIS NEW EVIDENCE. IN RULING ON THAT ISSUE, THE NINTH CIRCUIT HELD THAT A COLORABLE CLAIM WAS PRESENTED TO THE STATE COURT, AND THEREFORE THE NEW EVIDENCE—NEVER OFFERED IN STATE COURT—COULD BE CONSIDERED. THIS HOLDING IS PROPERLY CHALLENGED IN THIS COURT.

Correll claims that the State mischaracterizes the facts and that his "new evidence" did not play a role in the Ninth Circuit's determination in finding a colorable claim. Correll's assertion is confusing at best, and is merely an attempt to obfuscate the issue. The issue before the Ninth Circuit was whether the district court erred by refusing to expand the habeas record and hold an evidentiary hearing wherein Correll could present his new evidence.

In ruling on that issue, the Ninth Circuit held that Correll had presented a colorable claim to the state court, and therefore the new evidence could be considered at the hearing. In its petition, the State meticulously outlined what was presented to the state court. (Petition at 3–5.) In discussing the applicable law to the facts of the case, the State stated:

> The state courts should have the opportunity to rule on the merits of a claim with both the material facts and legal theories presented to them. In this case, Correll's own attorney conceded that he could not show prejudice based on the status of the record before the state court. It was only after Correll filed his federal petition that he offered the affidavits of the two psychiatric doctors that could possibly constitute a colorable showing of prejudice under *Strickland*. The district court clearly did not abuse its discretion by refusing to allow Correll to circumvent the exhaustion requirement by presenting this new evidence.

(Petition at 12.) In a footnote, the State quoted the portion of the Ninth Circuit's analysis of what the court determined was a colorable claim. (Petition at 12 n.3.) The State never intimated, in any manner, that the "new evidence" played a part in the Ninth Circuit's analysis of whether there was a colorable claim in state court. Given the fact that Correll's attorney conceded in state court that there was no colorable claim based on the status of the state court record, the State took issue with the Ninth Circuit's analysis on that point but nonetheless asserted that the new evidence offered in federal court could not be considered.

Correll does not dispute several very important points in the analysis of this issue. First, that his attorney in state court conceded there was insufficient evidence of prejudice under *Strickland* prior to the state court dismissing the state post-conviction relief petition. (Petition at J–2.) Second, that the California Department of Corrections' mental health examination report, relied on by the Ninth Circuit for its colorable claim analysis, was submitted to the state trial court after he had dismissed the petition. (Petition at K–1.) Finally, after the district court refused to expand the record, Correll attempted to exhaust his new evidence in state court, but procedurally defaulted by not filing the claim within 30 days of the filing of his notice to seek additional post-conviction relief.

After Correll's state-court concession that he could not show prejudice, a fact binding on Correll in these proceedings, the state trial court did not err under state law by dismissing the petition without conducting an evidentiary hearing. Correll's tardy submission of the California report is a procedural default precluding the federal courts from considering it. Finally, Correll's failure to timely file his successive state court petition is likewise a default prohibiting consideration of the new evidence that he now desires to present. The Ninth Circuit's analysis is not only inconsistent with the holding in *Tamayo-Reyes* and the other circuits' interpretation of that case, but it fails to recognize the multiple defaults Correll committed preventing the state court from entertaining the factual basis of the claim.

CORRELL'S ATTEMPT TO JUSTIFY THE NINTH CIRCUIT'S OPINION ON THE BASIS THAT *TAMAYO-REYES* HAD A STATE-COURT EVIDENTIARY HEARING, AND HE DID NOT, IS WITHOUT MERIT AS RECOGNIZED BY THE NINTH CIRCUIT IN THIS CASE.

Correll attempts to reconcile the cases finding a default when the prisoner fails to present material facts to the state courts by claiming that in those cases the states granted an evidentiary hearing, and in this case Arizona did not. However, when faced with this argument below, even the Ninth Circuit rejected this distinction.

> Correll argues that the cause and prejudice requirement does not apply because the *Tamayo-Reyes* rule is restricted to cases in which petitioners received a state-court hearing. Contrary to Correll's argument, *Tamayo-Reyes* endorses no such general limitation, although there are exceptions, as we found in *Chacon v. Wood*, 36 F.3d 1459, 1465-66 (9th Cir.1994).

(Appendix to Petition at 1987.) No other circuit has drawn this distinction, and Correll admits that other circuits have applied *Tamayo-Reyes*'s procedural bar even when there was no state-court evidentiary hearing. *See, e.g., Mathis v. Wright*, 975 F.2d 1493, 1497 (11th Cir. 1992). The only basis offered by Correll to support the Ninth Circuit's holding has no support from any other circuit and has been rejected by the Ninth Circuit in Correll's own case. This Court should likewise reject the contention and accept the petition.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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Criminal Appeals Section
(Counsel of Record)

Attorneys for PETITIONERS

CRM87-1160
17809

No. 98-222

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, et al.,
PETITIONERS,

- vs -

MICHAEL EMERSON CORRELL,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWARD, et al., Petitioners, vs MICHAEL EMERSON CORRELL, Respondent.	NO. 98-222 MOTION TO PROCEED *IN FORMA PAUPERIS*

Respondent/Cross-Petitioner Michael Emerson Correll hereby requests leave of this Court to proceed *in forma pauperis*. Leave to proceed *in forma pauperis* was sought at the District level and granted on September 30, 1987.

Undersigned counsel, BRIAN R. DANDO was appointed pursuant to the Criminal Justice Act of 1964 on December 8, 1987.

This Motion is submitted in accordance with Rule 39 of the Rules of the Supreme Court of the United States. Michael Emerson Correll requests that he be allowed to proceed pursuant to the relaxed filing requirements of that rule – with regard to both his Brief in Opposition and his Cross-Petition, both of which pleadings are submitted simultaneously with this motion.

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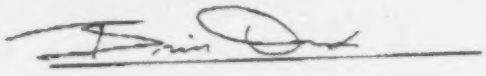
RESPECTFULLY SUBMITTED this 2nd day of September, 1998.



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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit has properly ordered a federal evidentiary hearing for a state inmate, who has presented a colorable claim that he was denied effective assistance of counsel at sentencing, but who was denied an opportunity to develop his claims or to present evidence at a state court hearing?

2. Whether refusal of a state court to permit development or presentation of a constitutional claim, deemed colorable by the Ninth Circuit, can constitute "cause", allowing fuller presentation of that claim at a federal evidentiary hearing?

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STATEMENT OF THE CASE[1]

On January 27, 1987, Michael Correll, acting pro per (with limited advice of unappointed counsel), filed a timely petition for post-conviction relief (PCR). Among the claims raised, Mr. Correll alleged that his trial counsel provided him constitutionally inadequate representation at the sentencing phase of his trial. (Petitioner's App. at D-1, 2). After appointment of PCR counsel, on or about April 10, 1987, additional pleadings were submitted, supplementing the PCR petition. Through pleadings, post-conviction counsel sought a stay of execution, additional time to develop Mr. Correll's claims, an evidentiary hearing, appointment of an investigator and appointment of a mental health expert. (Petitioner's App. at E, H, I, J). The post-conviction pleadings emphasized that trial counsel had presented no mitigation evidence at sentencing, that between trial and sentencing Mr. Correll conferred with counsel for only approximately five minutes, that in his youth, Mr. Correll had twice been committed to mental hospitals, and suffered from a long history of mental health problems. (*Id.*, *see also*, Affidavit of Correll, Petitioner's App. at G).

Although post-conviction counsel complained of a lack of any mental health evaluation, and documented his difficulty in obtaining records, the state court on May 14, 1987 summarily dismissed the petition and denied the stay of execution, denied additional time, denied an evidentiary hearing, denied appointment of an investigator and mental health expert. (Separate Appendix of Respondent – "App." at A-1 - A-3)

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[1] Respondent concurs with the recitations in the Petition for Writ of Certiorari with regard to the "Opinion Below", the "Statement of Jurisdiction", and the "Provisions Involved".

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Faced with this procedural history, the Ninth Circuit determined that Mr. Correll had presented a colorable claim of ineffective assistance of counsel (at sentencing) to the state court. It further determined that Mr. Correll is entitled to a federal evidentiary hearing on those ineffectiveness claims, because he was denied any meaningful opportunity to develop or present his claims to the state.

A portion of the court's analysis is set forth below:

> Correll's allegations, if taken as true, constitute a colorable claim of ineffective assistance of counsel. Correll asserts that during the month that elapsed between the jury verdict and the pre-sentencing hearing, his attorney met with him for just five minutes. Furthermore, the seven-page response to the state's sentencing memorandum that Correll's attorney submitted before the pre-sentencing hearing devoted barely a page to listing mitigating circumstances, virtually bare of any supporting evidence.
>
> Similarly, the transcript of the pre-sentencing hearing reveals that Correll's attorney failed to call witnesses or present any evidence at the pre-sentencing hearing, although he stated on the record that he knew of people who were willing to testify on Correll's behalf. Neither in the pre-sentencing memorandum nor during the pre-sentencing hearing did Correll's attorney raise Correll's psychiatric history or condition at the time of the crimes as a potential mitigating factor, apart from alluding in passing to the fact that Correll's parents had abandoned him when he was fourteen years old. This almost complete absence of effort on the part of Correll's counsel to investigate, develop, and present mitigating evidence, including evidence of Correll's psychiatric history and his condition at the time of the murders, constitutes deficient performance "outside the wide range of professionally competent assistance." *Strickland* 466 U.S. at 690.

(Petitioner's App. at A 1988-89).

The Ninth Circuit determined Mr. Correll should be permitted to introduce evidence of ineffectiveness, that was not presented to the state court, because the "cause"

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requirement, as discussed in the case of *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992), was met: The actions of the state court, in denying an evidentiary hearing and the opportunity to develop evidence "divested Correll of any meaningful opportunity to present this evidence at the state level". (*Id.* at 1991).

In concluding that an evidentiary hearing is required on the issue of ineffective assistance at sentencing, the Ninth Circuit rejected the state's argument that Mr. Correll should be "absolutely barred from seeking a federal evidentiary hearing if the material facts had not been developed in state court". (Petitioner's App. at A 1992) Instead, the court recognized that the "cause" prong of *Tamayo-Reyes* only requires a habeas petitioner to provide an adequate reason why the material facts were not developed in state court. It would not bar presentation of unpresented evidence if "cause" were found. The court determined that the rationale of the state's position sharply conflicted with the analysis of *Tamayo-Reyes:*

> Obviously, this interpretation would render the *Tamayo-Reyes* cause and prejudice rule entirely superfluous. Again, the state's logic is circular. It would serve no purpose to require the petitioner to explain a failure to develop material facts in state court if he or she were procedurally barred for failure to develop material facts. In claiming that the prerequisite to the cause and prejudice rule is the full development of facts in state court proceedings, the state turns the *Tamayo-Reyes* decision on its head.

(*Id. at 1993*). The Ninth Circuit warned that the state's position – calling for an additional showing of "evidence exhaustion" – would lead a petitioner into a "federal habeas cul-de-sac", because there could be no relief under *Tamayo-Reyes* for failure to develop a claim if, as a prerequisite to showing "cause and prejudice", all evidence must be fully developed at the state level. (*See,* Petitioner's App. at A 1992-1993)

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REASONS WHY THE WRIT SHOULD NOT ISSUE[2]

I.

THE NINTH CIRCUIT'S DECISION TO ALLOW A FEDERAL EVIDENTIARY HEARING ON ISSUES OF INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IS CONSISTENT WITH FEDERAL ANALYSIS AND CASE LAW.

As noted above, the Ninth Circuit found that Respondent Michael Correll had properly raised a colorable claim – that he was denied effective counsel at his sentencing – in his state post-conviction Rule 32 hearing. The appellate court also found that the state court had refused to allow Mr. Correll to develop his colorable claim, that it refused to consider any mental health evidence which might have been developed, and it denied an evidentiary hearing. Under these circumstances, the Ninth Circuit ruled that Mr. Correll would be entitled to a federal evidentiary hearing. (*Id.*) This conclusion is consistent with the U.S. Supreme Court case of *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992).

The specific petitioner in *Tamayo-Reyes* was denied a federal hearing, because he was given an opportunity to develop his claim in state court and failed to do so. Under *Tamayo-Reyes*, a petitioner has an obligation to raise evidence of his federal claims, when given an opportunity to do so – however, the obligation also extends to the state, which must afford this opportunity:

> just as the state must afford the petitioner a full and fair hearing on its federal claim, so must the petitioner afford the state a full and fair opportunity to address and resolve the claims on the merits.

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[2] Simultaneously with this Brief in Opposition, Respondent is filing a Cross-Petition seeking issuance of a Writ on other issues decided in the Ninth Circuit Opinion; however, regarding the issues raised in the state's Petition, Respondent submits that a Writ should not issue

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(112 S. Ct. at 1720). Here, by contrast, where a federal petitioner has been denied the opportunity to develop and present his claims, the case of *Tamayo-Reyes* supports the Ninth Circuit's conclusion that a federal evidentiary hearing is warranted.

The Petition for Writ of Certiorari filed by the State of Arizona strains to paint the Ninth Circuit decision as a departure from the traditional *Tamayo-Reyes* analysis – the state's effort include mischaracterization of facts. Specifically, the state suggests that certain evidence of ineffectiveness of counsel (newly developed at the federal level in support of the habeas corpus petition) played a role in the Ninth Circuit decision to provide a federal evidentiary hearing.[3] This was not the case. Based entirely on a review of materials available to and presented to the state court at the Rule 32 proceedings, the Ninth Circuit concluded that the ineffective assistance of counsel claim regarding sentencing was colorable.

The court noted that the state court procedural history was "replete with Correll's assiduous attempts to develop the theory that his counsel provided ineffective assistance at sentencing". Evidence provided to the state court included a record showing that counsel failed to investigate and present available mitigating evidence at sentencing, including evidence of mental health history and psychiatric condition, and that counsel failed to request a mental health diagnostic examination, even though he earlier challenged his client's competency to stand trial. The record at the Rule 32 proceeding further reflected

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[3] The state makes several references to evidence which the state had no opportunity to review, and at one point concludes "it was only after Correll filed his federal petition that he offered the Affidavits of the two psychiatric doctors that could possibly constitute a colorable showing of prejudice under *Strickland*." (Petition at 12). But the Ninth Circuit did not consider the supplemental record, offered as evidence at the federal district court, in finding the ineffectiveness claim colorable

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that Mr. Correll had twice been committed to mental health facilities and that he had suffered from a "lengthy mental health history dating from his early teen years". In summation, the court concluded that Mr. Correll had presented a colorable claim under *Strickland*. (Petitioner's App. at A 1988-1991)

Respondent Correll emphasizes this point because it demonstrates that the state was given an ample opportunity to consider the issues of ineffective assistance of counsel at sentencing, but refused to grant factual development or an evidentiary hearing. The Ninth Circuit compared this case to the matter of *Jones v. Woods*, 114 F.3d 1002, 1012 (9th Cir. 1997) in which the accused "tried and failed through no fault of his own to develop the facts relevant to his ineffective assistance claims at the state court level in the only permissible manner." In Mr. Correll's case, the court concluded that a federal evidentiary hearing was warranted, stating.

> Indeed, the actions of the state court divested Correll of any meaningful opportunity to present this evidence at the state level.
>
> Accordingly, the state cannot now insist the obstacle it placed in Correll's path when he sought a state-court hearing and the means to present evidence at that hearing should again prevent Correll from securing a federal evidentiary hearing.

(Petitioner's App. at A 1991).

The cases cited by the state from other circuits do not demonstrate a divergence of federal opinion on this issue. The inquiry under *Tamayo-Reyes* consistently asks whether the state court's proceedings fairly and adequately developed the facts. If the accused is

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responsible for failure to present his factual basis in state courts, then a federal hearing may not be granted. The cases cited by Petitioner merely recognize this analysis.

Most of the state's citations involve cases where a full court hearing was held, and the habeas petitioner failed to put forth the facts he subsequently attempted to advance in federal court. Under such circumstances, where the petitioner is responsible for the failure to develop the facts, Tamayo-Reyes may bar a federal hearing. See e.g. *Demarest v. Price*, 130 F.3d 922 (10th Cir. 1997) (The state court conducted a post-conviction relief evidentiary hearing at which witnesses were called); *Bannister v. Armontrout*, 4 F.3d 1434 (8th Cir. 1993) (State court held a pretrial hearing on the suppression claim during which those involved testified); *Mathis v. Zant*, 975 F.2d 1493, 1497 (11th Cir. 1992) (State court held an evidentiary hearing on the ineffective assistance of counsel claim and made findings, presumed correct under § 2254(d), that trial court strategy decisions were reasonable); *Turner v. Johnson*, 106 F.3d 1178 (5th Cir. 1997) (Petitioner was given two full post-conviction evidentiary hearings at state court, one of which the court described as "full blown"); *Livingston v. Johnson*, 107 F.3d 297 (5th Cir. 1997) (Although the hearing did not involve live testimony, a hearing was held which was deemed adequate, full and fair, and which resulted in an extensive finding of facts and conclusions of law by the judge.) In each of these cases cited by the state, the petitioner was deemed to have failed to develop his facts, and therefore was not entitled to a federal hearing.

Significantly, the federal courts are also consistent in finding that an evidentiary hearing is warranted in situations where factual development has been denied at the state level, through no fault of the habeas petitioner. See e.g. *Toney v. Gammon*, 79 F.3d 693, 697 (8th Cir. 1996) ("Generally, a habeas petitioner is entitled to an evidentiary hearing in

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federal court if the petition 'alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing.' *Wilson v. Kemna*, 12 F.3d 145, 146 (8th Cir. 1994)"); *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994) ("In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary in federal court."); *Jones v. Woods*, 114 F.3d 1002, 1013 (1997) ("Where, as here, the state court simply failed to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims."); *Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995) (Federal evidentiary hearing was appropriate where state trial court refused to hold an evidentiary hearing and instead resolved factual issues of jury misconduct solely on contradictory declarations submitted by the parties).

In summation, the Ninth Circuit decision simply applies the rationale of *Tamayo-Reyes* to determine that Mr. Correll is entitled to a federal evidentiary hearing in this case, where he was denied the opportunity to develop and present his ineffectiveness claims at the state level.[4]

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[4] The state makes much of a footnote in the Ninth Circuit opinion which indicates that *Tamayo-Reyes* does not equate "evidence exhaustion" to "claim exhaustion". (Petition at 10). That footnote does not deviate from the *Tamayo-Reyes* analysis; rather, the Ninth Circuit simply recognizes that failure to fully present a factual presentation at the state court is not an automatic procedural bar to consideration of new evidence at the federal level. Instead, the federal courts must ask why those material facts were not developed before determining if a federal evidentiary hearing is warranted. (Petitioner's App. at A 1992)

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II.

NINTH CIRCUIT PROPERLY DETERMINED THAT MICHAEL CORRELL HAD NO MEANINGFUL OPPORTUNITY TO PRESENT HIS INEFFECTIVENESS CLAIMS ON THE ISSUE OF SENTENCING TO THE STATE COURT THEREFORE DEMONSTRATING "CAUSE".

As the state's Petition indicates, "cause" has been defined as "some objective factor external to the defense [that] impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1984). The Ninth Circuit has applied this rule to this case, and determined that Mr. Correll has been denied the opportunity to develop and present his claims in a state hearing, after having demonstrated a colorable claim on ineffective assistance of counsel during sentencing. The Ninth Circuit finding, that "cause" exists for proceeding with federal evidentiary hearing, is consistent with the federal standard, and with the record on appeal.

The record clearly indicates that PCR counsel for Mr. Correll made repeated attempts through Rule 32 pleadings to obtain an evidentiary hearing and expert assistance. Counsel also requested additional time to prepare and develop his claims. All efforts to present and develop the claim were thwarted. (*See generally*, Statement of the Case, *supra)*. The state court denied all requests and summarily dismissed the Petition for Post-Conviction Relief in a Minute Entry of May 14, 1987. This Minute Entry clearly reflects an unwillingness on the part of the state court judge to entertain the claim set forth by Mr. Correll: The court concluded that there could be no showing of ineffectiveness because the judge specifically recalled that trial counsel had been competent:

> In this respect, the court specifically recalls that the trial work of defense counsel was precise, careful, and competent, and manifested strategic and tactical judgments of the same high quality.

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(App. at A-2). This personal judgment was rendered despite the fact that trial counsel failed to present any witness or any evidence of mitigation at the time of sentencing. The state court further reflected that it would not be influenced by any new evidence that investigation might uncover, especially with regard to mental health evidence, because it decided that all such evidence would be superseded by an earlier pre- competency screening:

> The Motions for Appointment of Investigator and Expert are DENIED. There is no suggestion that any information not available for presentation to the Court in prior proceedings would become available, or, if it did, that it could in any way have influenced the tribunals to which it might have been presented. The mental health materials Petitioner describes in his present pleadings were dated and superseded by contemporaneous Rule 11 proceedings.

(Id.)

The Ninth Circuit recognized that by the time this Minute Entry was entered, Mr. Correll had made a sufficient showing of ineffectiveness to present a colorable claim, warranting an evidentiary hearing. The blame for any failure to develop the specific evidence rests on the state court judge who refused to grant either the hearing or the investigative and expert funding to allow Mr. Correll to pursue his colorable constitutional claim.[5]

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[5] As rebuttal, the state points out that the PCR pleadings did not have as complete and detailed information regarding Mr. Correll's mental health condition as was subsequently presented to the federal court. However, in arguing that the state petition should have been packed with specific facts, affidavit and proof, the state fails to acknowledge that the lack of specificity was caused by the state court's refusal to fund investigation and experts, and to allow Mr. Correll to proceed with an evidentiary hearing. At the post-conviction relief stage, Petitioner proffered his known claims and proffered what support he could muster given his indigent situation and his incarceration

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The issue of "cause" is really one of opportunity – here, Mr. Correll had no opportunity to present his claims at the state court level. At the state court proceedings, Mr. Correll's counsel argued vehemently that he was being denied the opportunity to develop his claims. Post-conviction counsel made this point directly to the PCR judge in his Reply in Support of Post-Conviction Relief:

> If in fact there has been such failure so far [to document evidence of mitigation], it is attributable to the Court's refusal to grant Petitioner's motion (April 10, 1987) for appointment of a mental health expert to assist in gathering and presenting such evidence. Under A.R.S. §13-4013(B) such appointment is mandatory when requested, but has not been done. . . .
>
> At this point, Petitioner is simply trying to accomplish what should have been accomplished before he was sentenced – to have the Court order an examination to explore Petitioner's social and psychological history so that the Court will have full information upon which to base a rational sentencing decision.

(App. at B 12-13). Despite this plea, the trial judge summarily denied the allegations of ineffective assistance, as not stating a colorable claim – even though he had before him the trial record, in which virtually no defense was offered at the penalty phase of trial. The actions of the state court barred factual development and constitute "cause".

In the cases cited by the state, the factors offered by defendants as "cause" were not considered external, because the defendants themselves were responsible for failure to develop the claim. For example in *Turner v. Johnson*, 106 F.3d 1178, 1184 (5th Cir. 1997), the court found defendant was responsible for failure to present his federally proffered evidence:

> In so far as Turner is unable to show that the state evidentiary hearings were anything other than full and fair, we must determine whether cause and prejudice exist for Turner's

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> failure to present the proffered evidence, . . . Neither Turner nor the record suggest that "some objective factor external to defense impeded counsel's effort to develop the evidence". [citation omitted]

The instant case stands in sharp contrast. Here, the Ninth Circuit has determined that the "actions of the state court divested Correll of any meaningful opportunity to present his evidence at the state level" (Petitioner' App. at A 1991). Having improperly denied a hearing on a colorable claim of ineffective assistance, the state should not be allowed to again impede Mr. Correll, when given his first opportunity to present his constitutional claim at a federal evidentiary hearing.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent Michael Correll respectfully requests that this Court decline to issue a writ on the issues raised in the Petition, or requests in the alternative that this Court, affirm the opinion of the Ninth Circuit Court of Appeals, granting Michael Correll an evidentiary hearing on his claims of ineffective assistance of counsel at sentencing.

RESPECTFULLY SUBMITTED this 2nd day of September, 1998.

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